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REPORTS

OF

CASES

ARGUED AND DETERMINED

IN THE

Court of King's Bench,

WITH TABLES OF THE NAMES OF THE CASES AND PRINCIPAL MATTERS.

BY EDWARD HYDE EAST, ESQ.

OF THE INNER TEMPLE, BARRISTER AT LAW.

—— *Si quid novisti rectius istis,*
Candidus imperti; si non, his utere mecum. HOR.

VOL XV.

Containing the Cases of HILARY and EASTER Terms, in the 52d Year of GEO. III. 1812.

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JUDGES

OF THE

COURT OF KING'S BENCH

DURING THE PERIOD OF THESE REPORTS.

EDWARD LORD ELLENBOROUGH, C. J.
Sir NASH GROSE, Knt.
Sir SIMON LE BLANC, Knt.
Sir JOHN BAYLEY, Knt.

ATTORNEY-GENERAL.

Sir VICARY GIBBS, Knt.

SOLICITOR-GENERAL.

Sir THOMAS PLUMER, Knt.

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CASES

ARGUED AND DETERMINED 1812.

IN THE

COURT OF KING'S BENCH,

IN

Hilary Term,

In the Fifty-second Year of the Reign of GEORGE III. (*a*)

HAIGH and Others *against* CONWAY and DAVIDSON.

Thursday, Jan. 23d.

If in a joint action against two it appear that [2] one of the defendants has been outlawed upon different process from that by which the other was brought into court, and no connexion be shewn between the several writs of capias issued against each as referable to the same original; as where the one was outlawed upon process by original, tested the 10th of *April*, returnable on the first return of *Easter* term, and continued regularly down to the time of the outlawry; and the other was arrested upon a special testatum capias issued on the 24th of *April* in *Hilary* vacation, and tested in the preceding *Hilary* term; to which bail was put in; and the plaintiff declared against him alone, alleging the outlawry of the other defendant *in the same suit*; the Court will set aside the declaration for irregularity.

THE Attorney General obtained a rule in the last term, calling upon the plaintiffs to shew cause why the declaration filed against the defendant *Conway* alone, (stating that the other defendant *Davidson* was outlawed in this suit) should not be set aside for irregularity, on the ground that *Conway* and *Davidson* having been sued for a joint cause of action, *Davidson* had been outlawed upon different process by original from that by which the defendant *Conway* was brought into court. It appeared by the affidavit, that on the 24th of *April* 1811, being in *Hilary*

(*a*) Having been prevented by a severe illness from attending the Court during the greater part of this term, I am indebted for most of the cases now reported to my friends at the bar; to Mr. *Bosanquet* for the first case of *Haigh* v. *Conway*, and more abundantly to Mr. *Maule* and Mr. *Selwyn* for all the cases from *Mellish* v. *Bell* to *Clutterbuck* v. *Jones* inclusive, as well as for some others which follow, and which will be noticed accordingly. I have sincere pleasure in making public my own acknowledgments to these Gentlemen for their valuable assistance, and anticipate a more honourable and lasting satisfaction to them in the approving judgment of the Profession.

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vacation, the plaintiffs issued against the defendants a writ of testatum special capias from *Middlesex* into *Lancashire*, tested on some day in the preceding *Hilary* term, and returnable the second return of *Easter*, the quarto die post of which was the 8th of *May*: upon which writ *Conway* was arrested, and put in bail before a commissioner in the country, and notice thereof was given to the plaintiff's attorney on the 14th of *May*. But the process on which *Davidson* was outlawed was an original, tested the 10th of *April*, returnable the first return of *Easter* term, the quarto die post of which was the 1st of *May*; on which day the capias bore teste, returnable on the fourth return of the same term; and the alias, pluries, and exigent writs, tested respectively on the 22d of *May*, 14th of *June*, and 3d of *July*, regularly issued; on the return of the latter of which *Davidson* was outlawed: and a declaration was then delivered against *Conway*, stating that *Davidson* was outlawed at the suit of the plaintiffs in *this* cause.

Marryat now shewed cause, and contended that there was no objection to different writs running into different counties in the same term against several defendants in the same action, if there were no irregularity in the process against either respectively; for otherwise, where joint defendants live in different counties, as
[3] happened in this case, where the one lived in *Middlesex* and the other in *Lancashire*; and the latter is arrested upon a testatum capias issued into his own county, the former could not be proceeded against with effect to outlawry on the same process upon which the arrest of the latter was made: for to enable the plaintiff to do so, he must have sued out the antecedent process of capias against both before he could tell whether the one party would be arrested on the testatum capias or not; as after his arrest had taken place it would be too late to sue out the antecedent writ of capias in order to proceed against the other to outlawry by virtue of the original, which may be sued out at any time pending the action. And at any rate a plaintiff would be liable to this difficulty, that the original might be tested back before the cause of action, when it would render the outlawry unavailable. He would therefore be driven to the alternative of abandoning the arrest of the one defendant and serving him with fresh process, connected with a proper original, in order to prosecute the other to outlawry; which would be attended with additional expense and delay, and would deprive the plaintiff of the security of bail for the defendant who had been arrested.

Lord ELLENBOROUGH, C. J. The objection is that this is not a declaration against the one defendant, who has appeared, in the

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HAIGH *against* CONWAY.

same suit in which the other defendant has been outlawed, if the writs issued against the two be not connected and referable to the same original process. The proceedings against each may have been for the same cause of action, but not in the same cause.

BAYLEY, J. The cause in which *Davidson* was outlawed commenced subsequently to this, in which *Conway* was arrested; and it is not true, as averred, that *Davidson* was ever outlawed in *this* cause, in which that arrest was made.

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Per Curiam, Rule absolute.

MELLISH and Another *against* BELL.

Friday Jan. 24th.

A declaration stating that the plaintiffs (*M.* and another) caused to be effected a policy, containing that *J. G.* and Co. did make assurance and averring the interest in *F. W. S.*, with a promise by the defendant to the plaintiffs, in consideration of the premium paid by them, was held good after verdict; for it must be intended that the plaintiffs insured under the names of *J. G.* and Co., and that they were proved to be within one or other of the descriptions of

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persons in the stat. 28 *Geo.* 3. c. 56. in whose name or usual style or firm of dealing, insurance may be made.

IN assumpsit, the declaration stated that the plaintiffs, according to the usage of merchants, caused to be effected a policy of insurance, containing therein that Messrs. *John Gore* and Co., as well in their own name as for and in the name and names of all and every other person or persons to whom the same appertained, did make assurance, &c.: and, after setting out the policy, proceeded to state, that in consideration that the plaintiffs, at the request of the defendant, had paid to him 25*l.* premium for the assurance of 200*l.* upon the policy, the defendant promised the plaintiffs that he would become an assurer to them for the said sum: and then it averred the interest in the goods insured to be in one *Frederick William Schmaling.*

At the trial before Lord *Ellenborough,* C.J. at *Westminster,* a verdict was found for the plaintiffs. And in last *Michaelmas* term the *Attorney-General* having abtained a rule nisi for arresting the judgment, on the ground that it did not appear by the declaration that the plaintiffs were either the persons named in the policy, or the persons interested therein;

Garrow, Park, and *Marryat,* now shewed cause, and contended that as it appeared on the face of the policy that *Gore* and Co. insured; and in the declaration, that the plaintiffs caused the insurance to be effected; it must be taken that the plaintiffs insured under the names of *Gore* and Co.; and therefore at most the objection only amounted to this, that the plaintiffs' title was defectively set out, and not that it was defective; which objection was cured by the verdict. There was nothing incompatible in the supposition that the plaintiffs traded under the firm of Messrs. *John Gore* and Co.; and if that fact were necessary to be proved at the trial to support the declaration, it must be presumed after

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verdict that it was so proved. Besides, the declaration alleged that the plaintiffs paid the premium to the defendant, and that the defendant promised to become insurer to them. But supposing *Gore* and Co. to be different persons from the plaintiffs, there would not be any inconsistency; for they might be one of the description of persons mentioned in the stat. 28 *G.* 3. *c.* 56. (*a*)

The *Attorney-General*, *Topping*, and *Abbott*, contrà. The stat. 28 *G.* 3. *c.* 56. does not affect this question. It is necessary that it should appear on the record, that the person who brings the action is entitled either as the party named in the policy, or the party interested; neither of which appear in this declaration: for it is stated that the policy was effected by Messrs. *John Gore* and Co., who are not identified with the plaintiffs by any aver-
[6] ment; and the interest is averred to be in *F. W. Schmaling*. But it is said that the allegations in the declaration that *Gore* and Co. insured, and that the plaintiffs caused the policy to be effected, and that they paid the premium, and that the promise was made to them, could not have been proved at the trial, without its appearing that the plaintiffs were the persons designated by the description of *John Gore* and Co. in the policy. But the only proof necessary to have supported those allegations would have been, that the plaintiffs employed *Gore* and Co. to effect the policy; and as there is no averment to identify *Gore* and Co. with the plaintiffs, no further proof was necessary.

Lord ELLENBOROUGH, C. J. Here is a contract and a privity alleged between the plaintiffs and the defendants. The declaration states that the plaintiffs caused the policy to be effected, and then alleges the promise of the defendant to have been made to them. I should have thought therefore that at the common law this would have been a sufficient title in the plaintiffs to sue on the policy. That title however was restrained by the stat. 25 *Geo.* 3. *c.* 44., which required that the name of the agent effecting the policy should be inserted therein eo nomine as agent: and accordingly in *Bray and Others* v. *Edie* (*b*), the want of this insertion was held

(*a*) That statute, which repeals the stat. 25 *Geo.* 3. *c.* 44. enacts, that it shall not be lawful for any person to effect a policy of insurance on ships, goods, or other property, without inserting in such policy the name or names *of* (quære *or*) the usual style and firm of dealing of the consignors or consignees of the property to be insured, or the name or names, *or* the usual style and firm of dealing of the persons residing in *Great Britain*, who shall receive the order for and effect such policy, or of the persons who shall give the order or direction to the agents immediately employed to effect such policy.

(*b*) 1 *Term Rep.* 313.

to vitiate the policy. Then came the stat. 28 *G.* 3. *c.* 56. which repealed the former act, and requires that the persons making or causing insurances to be made should fall within one or other of the descriptions therein mentioned, but not that they should be described eo nomine as such in the policy. The statute therefore does not stand in the way of the plaintiffs' right to sue, and there is no objection at the common law where a privity of contract appears to exist between the parties.

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LE BLANC, J. The only question is whether it should be stated upon the record that *Gore* and Co. are mere names, or whether that may be shewn by evidence.

Per Curiam. Rule discharged (*a*).

(*a*) See *Bell and Others* v. *Gilson*, 1 *Bos. & Pull.* 345.

EMLY and Others, Assignees of BURROUGH, a Bankrupt, *against* LYE and Another.

Friday January 24th.

THIS was an action of assumpsit brought under an order of the Lord Chancellor by the plaintiffs, as assignees of the bankrupt, who was the holder of several bills of exchange at the time of his bankruptcy. The declaration, which contained different counts upon the bills, stated that before the time of the bankruptcy, the defendants *George Lye* and *E. L. Lye* being partners trading under the firm of *George Lye* and Son, *E. L. Lye* drew a certain bill of exchange on *W. Williams, on account and for the use of the said partnership, and by the authority of G. Lye*, payable to *H. Horne*, or order, two months after date for 50*l.* value received: and then stated an indorsement by *Horne* to *Burrough* before the bankruptcy, the presentment, and non-payment of the bill, in the usual way. There were similar counts on the rest of the bills, and also counts for money lent, for money paid to the defendants before the bankruptcy, for money had and received, and upon an account stated. The defendants pleaded the general issue.

At the trial before Lord *Ellenborough*, C. J. at *Westminster*, it was proved that the bills in question were all drawn in the name of *E. L. Lye* only. That the defendants were carriers residing at *Warminster*, and employed *Horne* as their book-keeper at *Salisbury*, where *Burrough* carried on the business of a banker.

Where one of two partners drew bills of exchange in his own name, which he procured to be discounted with a banker through the medium of the same agent, who procured the discount of other bills drawn in the partnership firm with the same banker; the

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latter has no remedy against *the partnership* either upon the bills so drawn by the single partner, or for money had and received through the medium of such bills; though the proceeds were carried to the partnership account; the money being advanced solely on the security of the parties whose names were on the bills *by way of discount*, and not by way of *loan* to the partnership; though the banker conceived at the time that all the bills were drawn on the partnership account.

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EMLY against LYE.

That *Horne* was in the habit of receiving bills from his employers, some drawn in the name of the firm, some by *G. Lye* only, and the bills in question by *E. L. Lye*. *Horne* carried these bills to *Burrough*, who was not acquainted with the defendants, but had received strong recommendations of them, and they were discounted by *Burrough* at various times; he making no distinction between the bills, but conceiving that they were all drawn on the partnership account. The proceeds of the bills were remitted and paid by *Horne* to the partnership account, and the discount thereof allowed to him in his account with the partnership. Upon these facts a verdict was found for the plaintiffs for 4619*l.* 10*s.* with liberty to the defendants to move to set it aside, and enter a nonsuit. A rule for that purpose having been obtained by *Burrough* in the last term,

Garrow, Marryat, and *A. Moore* now shewed cause, and relied on the money counts; contending that the transactions relative to the bills in question constituted a debt due to the bankrupt from the defendants. *Horne* was their agent; and it was the same thing as if the defendants had represented him as such to
[9] the bankrupt, and required the bankrupt to make advances on their account, taking a ticket or memorandum of the sums advanced. Such a transaction would have been money lent by the bankrupt to the firm. But the bankrupt, instead of taking such memorandum, received bills drawn by one of the firm only. That perhaps may narrow his right upon the bills to recover against that one partner only, but will not alter his claim upon the partnership to make good the sums advanced by him on their account, and applied to their use. The bills were given by the one partner only as a collateral security for the debt of both, which was not thereby merged; as was determined in *Wilson* v. *Kennedy* (*a*), where the debtor himself gave a promissory note for his debt; and the same doctrine was held in *Puckford* v. *Maxwell* (*b*). In *Siffkin* v. *Walker and another* (*c*), the action was brought only upon the note; but here there are other counts which will sustain the demand, on the ground of the money having been received for and applied to the partnership use.

The Attorney-General, Burrough, Dampier, and *Casberd* contrà. If this were a debt due from the partners to the bankrupt, for which the bills were given as a collateral security, the argument for the plaintiffs might avail: but here the bankrupt had no previous account with the partners, and the only transaction between them,

(*a*) 1 *Esp. N. P. Cas,* 245. (*b*) 6 *Term Rep.* 52.
(*c*) 2 *Camp. N. P. Cas.* 308.

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to constitute a debt, was the discount of these bills; the remedy therefore must be sought for under the bills only. But it is admitted that, according to the case of *Siffkin* v. *Walker*, the plaintiffs cannot charge the two defendants upon* the bills, which are only drawn by one of them in his own name. A party who discounts a bill must be content with the responsibility of the persons whose names are on the bill, and cannot resort to others whose names do not appear on it, however they may be benefited by such discount: and the conception of the person who discounts the bill cannot extend his rights. Here too the discounter might have known the distinction between the joint and several bills of the partners, having discounted bills of both descriptions. A party may choose to discount rather than lend money on bills, for the sake of entitling himself to receive the interest in advance: and the present receipt of it shews that the money was advanced on discount, and not on a deposit of bills. Then as to the proceeds of the bills having been applied to the use of the partnership; that alone has never been held sufficient to charge the receiving parties with the loan of the money so applied: for that would be to make a stranger to the bill liable, who gets it discounted in the market, without putting his name to it; the contrary of which has been determined in *Fenn* v. *Harrison and Another* (*a*). In that case there was not only an appropriation of the money discounted to the use of the defendants, but an express promise by them afterwards to take up the bill; and yet the action was held not to lie. The same principle is recognized in *The Bank of England* v. *Newman* (*b*), *Fydell* v. *Clark* (*c*), and in a case *ex parte Shuttleworth* (*d*). The cases of *Pinkney* v. *Hall* (*e*), and *Carvick* v. *Vickery* (*f*), were also mentioned on the rule to shew cause.

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Lord ELLENBOROUGH, C.J. The first counts of this declaration have been properly enough abandoned; for unquestionably on a bill of exchange drawn by one only, it cannot be allowed to supply by intendment the names of others in order to charge them. If the plaintiffs therefore would rest their claim upon the bills, they must confine it to *E. L. Lye.* The bills, considering the transaction as a discount between the parties, are his only. But it is contended that as the proceeds went to the use of the partnership, the partners are therefore liable upon the other counts. I am at a loss to discover what difference that circumstance can make, if it were originally a mere matter of discount; and I do

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(*a*) 3 *Term Rep.* 757. and 4 *Term Rep.* 177. S. C.
(*b*) 1 *Ld. Raym.* 442. *Com.* 57. S.C. (*c*) 1 *Esp. Rep.* 447.
(*d*) 3 *Ves. jun.* 368. (*e*) 1 *Salk.* 126. (*f*) *Dougl.* 653. *n.*

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not find any evidence to shew that it was any thing else. It was supposed indeed by *Burrough* (the bankrupt), that the money would be applied to the partnership use; and to such use it was in fact applied; but nothing passed from the defendants to induce him to believe that it was a partnership concern, and to lend his money on that account. It does not appear that any contract of that sort took place, nor any thing more than the mere discount of the bills: and it would be highly dangerous to follow the proceeds into the hands of every party to whose use they may be applied. If the bills had been void; as if for instance they had been forgeries: that might have made a different case; because then no consideration would have passed to the person discounting: but here a good consideration was given for the discount, namely, the responsibility of the drawer of the bills. In the absence therefore of any express contract between the parties, it appears to me that we must treat the transaction as a mere discount of the bills.

[12] GROSE, J. It is contended that this was money lent to the partnership; but it was only mere matter of discount, and not money advanced on the general security of the partnership, although it was applied to their use. At the time when the discount took place, the partnership had made no contract with the discounter, who therefore must be taken to have purchased the bills of one of the partners only. If the partners were not liable at the time when the discount was made, the subsequent application of the money cannot make them liable.

LE BLANC, J. On the securities themselves I think this action cannot be maintained; for to charge the defendants on these bills, they must appear to have been drawn for and on account of the partnership. The question then upon the other counts is whether this was a loan to the persons to whose use the money was applied, or only a discount of the bills. It appears to me on the evidence, notwithstanding the apprehension of the banker or the clerk, or the subsequent application of the money, to be merely a transaction of discount, and not an advance of money, taking the bills as a collateral security. But where another security is not required, the party who discounts a bill of exchange stands in the situation of a purchaser of the bill; and therefore, according to the case of the *Bank of England* v. *Newman*, cannot recover against the person with whom he discounts it, and whose name is not on the bill, the money advanced by way of discount.

[13] BAYLEY, J. I cannot treat this as a case of money lent to the defendants. *Burrough* never considered himself as lending money to them: if he had, he would have made an entry in his books

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charging them as his debtors. There was no contract made between the parties at the time, nor any previous subsisting debt between them. I think therefore that the discounter has made a purchase of the bill. If a person buy goods of another, who agrees to receive a certain bill in payment, the buyer's name not being on it, and that bill be afterwards dishonoured; the person who took it cannot recover the price of his goods from the buyer, for the bill is considered as a satisfaction. It has been so held; and I can see no difference where money instead of goods is given for the bill.

Rule absolute.

MELLISH and Another *against* ANDREWS.

Saturday Jan. 25th.

The assured of goods having received intelligence on the 8th of *Jan.* 1811, that the ship's papers were taken away on the 7th of *Dec.* preceding, by the *Swedish* government within whose port she was, did not give notice of

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abandonment to the defendant underwriter till the 17th of *January:* but though such notice was too late, supposing an abandonment to be necessary; yet as the goods were finally seized and unladen by orders of that government on the 30th of *April* following; it was held that the ineffectual notice of abandonment before given did not preclude the assured from recovering as for a total loss, without any abandonment.

ASSUMPSIT on a policy of assurance on goods on board the ship *Minerva,* at and from *London* to the ship's discharging port or ports in the *Baltic,* warranted free from capture in her port of discharge; with permission to touch and stay at any ports or places whatsoever and wheresoever, and to load and unload goods, particularly in *Sweden.* The interest was averred in *F. W. Schmaling;* and the loss alleged was that the ship with the goods on board was with force and violence seized, taken, and detained by persons unknown.

At the trial before Lord *Ellenborough,* C. J. in *London,* it appeared that the ship sailed in *August* 1810, and proceeded to *Gottenburgh,* where she was detained with the convoy until the end of *October,* when she sailed, and arrived off *Carlsham* in the beginning of *November.* Orders were there given by the agent for the ship to proceed to *Swennemunde;* on her arrival at which place the captain, having gone ashore, returned with orders to sail away immediately. The ship accordingly set sail, and put back to *Carlsham,* where, in consequence of bad whether she had met with, she was obliged to undergo some repairs. On the 7th of *December,* whilst the ship was under repair, her papers were taken away, and she remained in that state until the 30th of *April* 1811, when her cargo was seized and unladen by a military force acting under the orders of the *Swedish* government, and was never restored. It did not appear precisely at what time the intelligence of the state of the ship on the 7th of *December* reached the plaintiffs; they began however to deliver notices of abandonment to several of the underwriters on the 8th of *January* 1811, but notice was not served on the defendant until the 17th. The

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action was commenced in *Trinity* Term 1811. Lord *Ellenborough*, C. J. thought that the abandonment had not been made within a reasonable time; and the Jury accordingly found a verdict for the defendant. A rule nisi was obtained in the last term for setting aside the verdict and having a new trial, on the ground that in the conclusion there had been a total loss, and consequently that notice of abandonment was not necessary.

Park, *Topping*, and *Taddy*, now shewed cause, and contended that this was not a case of capture but of *detention*, which therefore rendered an abandonment necessary. It is averred in the declaration that the ship was with force and violence seized, taken, and *detained;* and it appears clearly that the plaintiffs meant to avail themselves of the detention only, for they had given notice of abandonment, although not within due time. In *Tunno* v. *Edwards* (*a*), Lord *Ellenborough* said "that it was an established and familiar rule of insurance law, that where the thing insured subsists in specie, and there is a chance of its recovery, there must be an abandonment." There the goods insured had been seized and confiscated: there was no abandonment: and afterwards half the cargo was restored, which produced more than the whole value. The Court there said that in order to have made it a total loss, there ought to have been an abandonment. The plaintiffs here meant to give a notice of abandonment in time. [*Bayley*, J. They now rely on the seizure of the 30th of *April*, and claim as for a total loss.] It is not competent to them to do that, having given notice of abandonment previously. Can they recover upon this record as for a capture? [*Le Blanc*, J. The record states a seizure. Lord *Ellenborough*, C. J. Every capture is a seizure.] In a policy the word *seizure* does not contemplate a *hostile* seizure. [Lord *Ellenborough*, C. J. By the term *seizure* the parties must have contemplated hostile seizure or capture.] In *Hodgson* v. *Blakiston* (*b*), it was holden that notice of abandonment was necessary, though the ship and cargo had been sold. [Lord *Ellenborough*, C. J. The general convenience of making an abandonment has led to an opinion that it is more necessary than it really is. A party is not in any case obliged to abandon: neither will the want of abandonment oust him of his claim for that which is in fact either an average or a total loss, as the case may be. Where there is an abandonment, the risk is thrown on the underwriters: where there is no abandonment, the party takes the chance of recovering according to his actual

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(*a*) 12 *East*, 491. (*b*) *Park's Ins.* 240. 6th edit.

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loss. Lord *Kenyon* held that, without abandonment, an average loss might be recovered. In this case would not the detention from the 7th of *December* to the 30th of *April* amount to an average loss; and if so, and that had been put to the jury, must they not have found a verdict for some loss?] In *Allwood* v. *Henckell* (*a*), Lord *Kenyon* thought an abandonment necessary; observing that the assured must make his election speedily, whether he will abandon or not. [Lord *Ellenborough*, C. J. But there he permitted the assured to recover an average loss. In that case, consistently with the doctrine now contended for, Lord *Kenyon* ought to have directed a nonsuit.] In case of hostile capture, notice of abandonment is not necessary: so if the thing insured goes to the bottom of the sea. But here there is no question of hostile seizure; this country was not at war with *Sweden*. This is the case of detention by princes, where abandonment is necessary. [Lord *Ellenborough*, C. J. Abandonment is only necessary to make a constructive total loss.]

The Attorney General contrà, was stopped by the Court.

Lord ELLENBOROUGH, C. J. I hope that nothing which has been said during the discussion of this day will induce any person to forego the practice of abandonment, which is very convenient. But we are clearly of opinion in this case, that there should be a new trial.

Per Curiam, Rule absolute.

(*a*) *Park's Ins.* 239.

RAPER and Others *against* BIRKBECK and Others.

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Saturday, Jan. 25th

A bill of exchange having been accepted payable at *Ladbroke's*, with a direction in writing on it, "*in case of need to apply at* Boldero's," and having been dishonoured when due at *Ladbroke's*, and thereupon brought to *Boldero*, who, thinking that it had been made payable at his house, under that mistake cancelled the acceptance; but presently, observing the mistake, wrote under it, "*cancelled by mistake*," and signed his initials to it; yet nevertheless paid the bill for the honour of the plaintiffs, whose indorsement was on it; held that the plaintiffs, on proof of such cancellation by mistake, might recover upon the bill against prior indorsers.

THIS was an action brought on a bill of exchange for 534*l*. 18*s*., drawn by one *Crossley* on *Samuel Shawe* and Co., and accepted by them, at Messrs. *Ladbroke*'s and Co., *London*, payable six months after date. The declaration, after stating several indorsements over to the defendants, alleged an indorsement by them to the plaintiffs by name; and then averred in the usual way the presentment of the bill for payment at *Ladbroke*'s, and their refusal to pay it. At the trial before Lord *Ellenborough*, C. J. in *London*, after last *Trinity* term, it appeared that the defendants, who were bankers in *Yorkshire*, paid the bill in question, with others, to the plaintiffs, who were likewise bankers there; and it

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was then in a perfect state, with the several indorsements and acceptance on it. When the bill became due on the 21st of *January* 1811, being then in the hands of *Down* and Co., their clerk carried it to the general clearing-house of the bankers in *London*, and received it back from *Ladbroke*'s clerk as a dishonoured bill, with the words "no account" written thereon. But as there was also written at the back of it, "In case of need apply to *Boldero* and Co.," the bill was sent to *Boldero*'s house in the course of the clearing hours, where *H. Boldero*, one of the partners, upon receiving the bill from his clerk, intending to allow it in account with *Down* and Co., drew his pen through the acceptance, and cancelled it by mistake, thinking it had been an acceptance payable at their house: but the bill had not then been allowed in the clearing-house, nor taken down in the clearing-
[18] book; and in less than ten minutes from the time of cancelling it, the clerk informed him of his mistake, and wrote under the acceptance, "Cancelled by mistake," to which *H. Boldero* subscribed his initials. But nevertheless the bill was taken up by *Boldero*'s house for the honor of the plaintiffs, with whom they had an account, and was never out of their hands afterwards. On the following day, one of the prior indorsers called at *Boldero*'s for the bill in order to pay it; but on finding that the acceptance had been cancelled, said that as it appeared cancelled, he would not take it up. Upon these facts, the jury found a verdict for the plaintiffs: and in the following term the *Attorney-General* obtained a rule nisi for a new trial, on the ground that the cancellation, in fact, though accidental, threw a difficulty upon the defendants of recovering over against the prior indorsers, as it would be necessary to go through the same media of proof to establish their claim over against such prior indorsers: a difficulty which ought not to be thrown upon them, especially by the act of the then holders of the bill; and which difficulty might be increased by the death of any of the witnesses in the mean time: and therefore he contended that this action did not lie.

Garrow and *Holroyd* now shewed cause against the rule, and said that the only pretence there could be for disturbing the verdict was that the effect of this accidental cancellation might be to prevent the defendants from recovering over against the prior indorsers. But their legal remedy upon the bill remains the same as before, however the circumstance may throw more of difficulty in their way, and require some additional proof by way of explana-
[19] tion. This is no more than might happen from any other accident to which a bill of exchange is liable; as if it should be obliterated

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by a quantity of ink falling upon it, or torn by a child; and yet it cannot be contended that in such case the party would be precluded from his remedy on the bill. It is observable that this cancellation was not only done by mistake, but was done also by a person who had no authority to cancel; for the acceptance was at *Ladbroke*'s, and not *Boldero*'s acceptance. But wherever an instrument is not made an end of, then if any thing be done to it by a person who has no authority to do the act, the act so done will not vitiate it. In *Fernandez* v. *Glynn* (*a*) it was held, where a banker's clerk had cancelled a cheque by mistake, but had afterwards written under it, "Cancelled by mistake," that the banker might, notwithstanding, return the cheque unpaid, for he had not thereby made it his own.

The Attorney-General contrà. The objection is not of the plaintiff's own raising, but, as appears by the evidence, has been made by one of the prior indorsers refusing to take the bill up on that very account. The question then is, whether the defendants, before they are compellable to pay the amount of the bill to the plaintiffs, have not a right to require that they shall be placed in such a situation as to have the usual means furnished them of resorting over against the prior indorsers. If they have such right, it is an answer to this action; for it is clear that the cancellation will impose upon them many difficulties of proof out of the ordinary course. The bill upon the face of it appears to have been [20] paid; and it will be necessary, in order to support any action on it, to go into evidence explanatory of that circumstance. That evidence may be removed out of the reach of the defendants, either by death, or a variety of other accidents. It is said that this is the common chance attending upon all cases; the answer to which in the present case is, that the parties themselves, who held the bill at the time, had no right by their own act to impose these difficulties upon others, though if the law had cast them upon the defendants, it might have been different.

Lord ELLENBOROUGH, C. J. I should have felt considerable pressure in the argument used on behalf of the defendants, if the fact had borne them out. Undoubtedly the indorsees, generally speaking, are bound to return the bill to the indorsers in the same plight as they received it, and unchanged by any act of theirs: but I cannot consider the act of *Boldero* as the act of the indorsees, for he had no authority either express or implied from them to do the act, and the whole originated in his mistake. The case then

(*a*) 1 *Campb. N. P. Cas.* 426. in a note.

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comes to the instances put in argument at the trial, of a blot having fallen upon, or a child having torn or destroyed, the instrument. In such cases the law is not so strict as to require the precise formal proof which is ordinarily required; for that would be at once to preclude the party of his remedy. I remember *Pothier* (*a*), in his treatise on bills of exchange, speaking of an acceptor who has put his signature to a bill, but has not parted with it, says, that before he does part with it, "il peut changer de volonté et

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rayer son 'acceptation.'" *A fortiori*, then, a third person who cancels an acceptance by mistake, having no authority so to do, shall not be held thereby to make void the bill, but shall be at liberty to correct that mistake, in furtherance of the rights of the parties to the bill.

Per Curiam, Rule discharged.

(*a*) 2 *vol.* 114. *partic.* 1. *ch.* 3. *s.* 3.

Saturday Jan. 25th.

JONES and Another, Assignees of MINGAY and Co. Bankrupts, *against* DWYER and Another.

The st. 21 *Jac.* 1. c. 19. *s.* 11. only transfers to the assignees of a bankrupt such goods as, by the consent of the true owner, the bankrupt has in his possession *at the time of his bankruptcy*. Therefore where the purchaser of goods, lying at a wharf in the name of the

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seller, received from him at the time of the sale an order on the wharfinger for the delivery of the goods, but

IN assumpsit for money had and received by the defendants to the use of the plaintiffs as assignees, the facts of the case, as they appeared in evidence at the trial before Lord *Ellenborough*, C. J. at *Guildhall*, were these. On the 16th of *December* 1809, *Edmund Cotteril*, being indebted to *Mingay* and Co., transferred to them by a sale note, or bill of parcels, in the joint names of himself and *Wallace*, a large quantity of bacon then lying in the name of *Cotteril* only at *Bridge-yard* wharf and two other wharfs; and at the same time handed over to them an order, in his name alone, upon the wharfingers for the delivery of the bacon. The bacon continued however at the wharfs in the name of *Cotteril* until the 13th of *June* following, during which time he disposed of several lots of it, which were delivered by the wharfingers to his order. On that day *Cotteril* stopped payment; of which circumstance *Mingay* and Co., the vendees, being apprised, in consequence thereof lodged with the wharfinger at *Bridge-yard* the order of the vendor given to them in *December*, and in the even-

suffered them to remain in the name of the seller for several months after; during which time the seller disposed of a part thereof; but upon notice of the seller's insolvency, the purchaser carried the order to the wharfinger, and had the goods transferred into his own name; and nine days after that the seller became bankrupt: Held that the assignees of the bankrupt were not entitled to these goods; for there was a complete transfer of the possession before the bankruptcy.

Qu. Whether the statute would at any rate have extended to goods the joint property of two traders, but deposited at the wharf in the name of one only, who, after such sale in his own name, became bankrupt?

Qu. Also whether a broker, who sells goods and receives the money for them on account of his principal, can controvert his title to the goods in an action brought against him by the principal for the money?

ing of that day the bacon was transferred by the wharfinger into their names. On the 22d of *June Cotteril* became a bankrupt; and in the *July* following a commission of bankrupt also issued against *Mingay* and Co. In *August* the defendants sold the bacon, *as brokers,* for and on account of *the plaintiffs,* from whom they received and lodged with the wharfinger, two orders for the delivery of the bacon to the purchasers. The defendants had since received notice from the assigness of *Cotteril* to pay to them the proceeds of such sale, in consequence of which they withheld them from the plaintiffs. A verdict was found for the plaintiffs for 6844*l.* 12*s.* 6*d.*; and in the following term the *Attorney-General* obtained a rule nisi for a new trial, on the ground that *Mingay* and Co. having suffered *Cotteril* to have the possession and disposition of the bacon up to the time of his insolvency, their taking possession at that time was fraudulent as against the creditors of *Cotteril,* who were therefore entitled to the goods under the statute 21 *Jac.* 1. *c.* 19. *s.* 11.

Park and *Scarlett* now shewed cause upon three grounds: 1st, That as it appeared that the defendants were employed by the plaintiffs, as agents for them, to sell, and under that employment did actually sell and transfer the goods to the several purchasers on account of the plaintiffs, it was not now open to them to contravene their own acts by impeaching the title of their employers; and they compared it to the case of a tenant, who is [23] estopped from disputing the title of his landlord under whom he holds. 2dly, That the possession of *Cotteril,* being a possession on account of himself and *Wallace,* who it appeared was jointly concerned with him in the bacon, and was not involved in his bankruptcy, was not within the statute; which had never been extended to cases where the possession of the bankrupt was a *joint* one. [*Le Blanc,* J. The bacon stood in the name of *Cotteril* only, and the order on the wharfinger was from him alone.] Those circumstances are consistent with a joint property, which it appears this was. *Wallace* might undoubtedly have disposed of the bacon before the bankruptcy, and if he had so done, the assignees of *Cotteril* could have had no claim against him. 3dly, (Which was the principal point in the case,) the transfer of the bacon into the names of *Mingay* and Co. was not fraudulent, but the possession was thereby changed and vested in them. The order in *December,* under which that transfer was made, was given to them bonâ fide at a time when *Cotteril* was perfectly solvent: and though it was not then executed, nor until after they had notice of his insolvency, yet it was executed several days prior

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to his bankruptcy, and with a bonâ fide intent on the part of *Mingay* and Co. to possess themselves of the goods, and not to cover the possession of *Cotteril:* this therefore was a valid execution of the order, and changed the possession from the one to the other at that time. But the stat. 21 *Jac.* 1. *c.* 19. *s.* 11. transfers only to the assignees such goods as, by the consent of the true owner, the bankrupt has in his possession *at the time of his bankruptcy*. Unless therefore the words *at the time of his bankruptcy* can be construed to mean *before his bankruptcy*, [24] the statute does not attach. This case is very distinguishable from *Darby* v. *Smith (a)*. There the plaintiffs, who were trustees, suffered the bankrupt, in dereliction of their trust, to remain in possession, and to acquire a right in the goods; and just upon the eve of his bankruptcy endeavoured to repossess themselves of them. But Lord *Kenyon* considered that they had no authority to defeat the right of the assignees: and if that were so, then the bankrupt must be taken to have had the full ownership at the time of his bankruptcy.

The Attorney-General and *Lawes*, contrà. The same argument that has been relied upon in this case, that the possession was changed before the bankruptcy, was also strongly pressed in *Darby* v. *Smith*, but without success; and there is no distinction between that case and the present. There the bankrupt had acquired no property in the goods before his bankruptcy, having failed to pay the instalments for them to his wife's trustees, which he had contracted to do; and the trustees on the eve of his bankruptcy resumed the possession; yet the case was held to be within the statute. [*Bayley*, J. Did not Lord *Kenyon* decide that case on the ground that the trustees suffered the bankrupt to have the possession, order, and disposition of the goods down to the time of his bankruptcy? the report states that he so said. Lord *Ellenborough*, C. J. If Lord *Kenyon* had considered it otherwise, I should not have thought even his authority binding, when opposed to the clear intelligible words of the statute.] The fact was certainly otherwise; for the trustees took possession the evening before the bankruptcy. That case therefore decides that, [25] although the possession may be taken before the bankruptcy, still, if it be fraudulent, it will not prevent the statute from attaching. Here the taking possession by *Mingay* and Co. is alike fraudulent with the possession of the trustees in that case. Having the order for the transfer delivered to them in *December*, they

(*a*) 8 *Term Rep.* 82. 6 *Ves. jun.* 488. S. C.

laid by from that time until *June*, and in the interval suffered *Cotteril* to dispose of a part of the goods, thereby furnishing the best test of his having the controul over them. It was only upon notice of his insolvency that they took steps to obtain the possession. But that possession, after they had suffered *Cotteril* to trade with the goods as his own, and thereby deceive the world, is fraudulent, and according to *Twine*'s case (*a*), within the stat. 13 *Eliz. c.* 5. On the 2d point; if *Wallace* also suffered *Cotteril* to have the possession as his own, he cannot be in a better situation. On the 1st point; the defendants are liable to the real owners, whosoever they may be, for the value of these goods. If therefore the plaintiffs are not such, they cannot recover in this action, where the right to recover depends upon the question in whom the title to the goods is. It would be strange to hold the defendants liable at all events to the plaintiffs because they may have imposed themselves upon them as the real owners; for that would be to make them liable both to the plaintiffs and to the real owners.

Lord ELLENBOROUGH, C. J. How the statute of *Elizabeth* applies, and how the case can be compared to a conveyance within that act, I am at a loss to conceive. The question depends on the statute of *James*, and that question is whether the goods can be said to have been in the possession of *Cotteril*, as the true owner, *at the time he became bankrupt*. It seems to me that the possession was as completely removed out of him as it could be. A complete change of the property took place by the transfer made in the wharfinger's books. If I were at liberty to construe the plain words of the statute, "*at such time as they shall become bankrupt*," to mean *before* the bankruptcy, I must here extend that construction to nine or eleven days before. Where then am I to stop? There is no period of time which may not be engrafted on the statute by such a construction, If I may depart so far from the clear language used in it. The case of *Darby* v. *Smith* has been much pressed upon us. That was a case arising out of an arbitration. The arbitrator, in forming his judgment, was of opinion that the possession of the trustees was colourable; and the Court in upholding his judgment, must I think be taken to have adopted the opinion, that the goods still remained in the possession of the bankrupt, in whose house they were, up to the time of his bankruptcy. I cannot conceive that they meant to supersede the clear intelligible words of the statute. Its lan-

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(*a*) 3 *Rep.* 80.

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guage is positive and emphatical, and incapable of being obscured by any construction; and I must have stronger expressions than I find in *Darby* v. *Smith* before I consent to supersede it. It would be highly dangerous by any construction to vary the period of time fixed by the statute. It is not necessary to discuss the other points. With respect to the joint ownership of *Wallace;* if it be in the usual course of trade to deposit joint property in the name of one only, the argument may be good; if not usual, I should think the property would pass; but that usage perhaps is
[27] a question of trade for the decision of a jury. The other point, whether an agent, who has sold and converted the goods of his employers into money, can set himself up to resist their title, it is not material to consider; inasmuch as if he were at liberty so to do, the defendants in this case are not entitled to retain the money either on the construction of the statute 13 *Elizabeth* or stat. 21 *Jac.* I think therefore that the plaintiffs are entiled to recover.

GROSE, J. concurred.

LE BLANC, J. As upon one point of this case the Court is unanimous, it is not necessary to consider the others. Upon the principal point, I think the case neither within the stat. 13 *Eliz.* nor that of the 21 *Jac.* There is no fraud imputed to the order upon the wharfinger, given by *Cotteril* on the 16th of *December:* at that time he was not insolvent: the only fraud imputed is to the execution of that order on the 13th of *June:* yet possession was taken nine days before the bankruptcy, by the transfer of the goods into the names of *Mingay* and Co., which was all that could be done to change the property. But the statute of *James* gives to the assignees such property only as the bankrupt has in his order and disposition *at the time of his bankruptcy:* and in *Darby* v. *Smith,* the possession taken by the trustees on the night before the bankruptcy was considered by the Court as no alteration of the bankrupt's possession, so that he was still in possession at the time. I cannot therefore consider that case as carrying the words of the statute beyond their ordinary import.

[28] BAYLEY, J. I agree with the rest of the Court. The statute of *James* applies only to cases where the visible possession remains in the bankrupt down to the time of his bankruptcy. *Darby* v. *Smith* does not militate against this construction. In that case it was considered that no change had taken place in the visible ownership, but that the goods remained as much in the possession of the bankrupt, as if the person who took possession for the trustees had not been there. Lord *Kenyon* in his judgment con-

siders that the trustees had no right to take possession; which clearly shews that he thought the bankrupt still in possession. If *Darby* v. *Smith* has been considered to apply to cases where the possession has been changed before the bankruptcy, it must be considered so no longer. In the present case, it is true, that *Mingay* and Co. forbore taking possession until the 13th of *June*, but they forbore at their own peril; for if *Cotteril* had committed an act of bankruptcy before that time, they would have lost the goods. Their taking possession on that day is the same thing as if the order had been then given to them; at which time there is no doubt but that *Cotteril* was competent to have give such order.

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Rule discharged.

POWELL and Others *against* DIVETT and Others.

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Saturday, Jan. 25th.

A material alteration in a sale-note by the broker, after the bargain made, at the instance of the seller, without the consent of the purchaser, annuls the instrument, so as to preclude the seller from recovering upon the contract evidenced by the instrument so altered by him.

IN assumpsit for the non-performance of a special agreement for the purchase of wool, which was tried before Lord *Ellenborough*, C. J. in *London*, it appeared in evidence, that on the 6th of *March* 1810, one *Marsh*, the plaintiffs' broker, sold to the defendants a parcel of wool, and delivered to the parties the usual bought and sold-notes; and afterwards entered it in his books, but such entry was not signed. The note delivered to the plaintiffs by the broker was originally in this form, addressed to Messrs. *Powell* and Co. "Sold for your account to Messrs. *Divett* and Co., the following parcels of *Spanish* wool, (a few bags more or less,) of each mark, viz. (specifying them and the rates of price) customary tear and allowance. To be paid for by acceptances at two, four, six, and eight months." And there was a counter bought-note delivered to the defendants. On the same day, after the notes had been respectively delivered, one of the plaintiffs, the vendors, brought their note back, and represented to *Marsh* that it was necessary to have a clause inserted in the note, that the damaged wool should be taken at a valuation; that *Mazaredo*, of whom the wool was originally purchased, had so told him. Whereupon the broker, though remonstrating against it, inserted in the plaintiffs' note a memorandum to this effect: "Such part as may be damaged to be taken at such allowance as shall be settled by two experienced brokers." No such alteration was made by the broker in the defendants' note, nor were they informed of the alteration until a considerable time afterwards, when

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they objected to it. The declaration contained counts on the original contract, and on the contract as altered in the plaintiffs' note, and averred that the plaintiffs were ready to deliver the whole of the wool, but that the defendants refused to accept the bills, &c. But the plaintiffs having produced in evidence the altered note only, Lord *Ellenborough* was of opinion that the alteration annulled the contract, and thereupon directed a nonsuit. In the last *Michaelmas* term the *Attorney-General* obtained a rule nisi for setting aside the nonsuit, and for having a new trial, on the ground that the contract made by the broker, and evidenced by the delivery of the bought and sold notes, was binding on both parties, and that any alteration of the contract afterwards by one of the parties only, without the assent of the other, was merely inoperative: and he cited *Heyman* v. *Neale* (*a*), where Lord *Ellenborough* had considered that the entry of the contract made and signed by the broker, as the agent of both parties, was alone the binding contract; which would be good, though no bought or sold note was afterwards sent to the vendor or purchaser; that being only done for their information.

Park, *Topping*, *Walton*, and *Marryat*, now shewed cause, and contended that as the only evidence given at the trial was the altered note, and as it appeared that the alteration had been made by the plaintiffs' broker, at the instance of the plaintiffs, and without the knowledge of the defendants, the original contract was thereby extinguished, and the present action could not be sustained.

[31] The *Attorney-General* and *Gurney*, contrà, denied that the plaintiffs, by the alteration, destroyed the legal effect of the contract as it originally stood. By the delivery of the bought and sold notes to the parties, a perfect contract was constituted, which could not be altered without the consent of both. The defendants might have brought an action on their note, as they did not consent to the alteration. It may be admitted that an alteration in a material part of a deed or a promissory note will destroy the effect of the deed or note; but those cases are distinguishable from the present; for the alteration there is in the instrument under which the party claims, but here there was a reciprocal binding. There is no rule of law which says that if one party make an alteration in a contract, upon the expectation that the other party will accede to it, such an alteration will extinguish the contract. Here there was an attempt to alter the contract by one party, which was not

(*a*) 2 *Campb. N. P.* 337.

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completed for want of the assent of the other; the alteration attempted therefore was inoperative, and the contract then remained as it originally stood. It is like the case of a bill of exchange, where the acceptance is cancelled by mistake (*a*). The circumstance of the instrument having been altered may call for explanation; but, when explained, the alteration is gotten rid of.

Lord ELLENBOROUGH, C. J. The defendants' note not having been produced, there is an end of the question. The only evidence of the contract was an instrument, the effect of which was destroyed according to the case of *Master* v. *Miller* (*b*), by the fraudulent interpolation procured by the plaintiffs' own act. Whatever rights the defendants may have under their part of the contract, [32] the plaintiffs can claim none from theirs, which they have vitiated by their own fraud.

GROSE, J. concurred.

LE BLANC, J. The alteration having been made by the plaintiffs themselves in a material part, this case falls precisely within the doctrine laid down in *Master* v. *Miller*, which decision was not confined to negotiable instruments.

BAYLEY, J. Without a written contract, the case would be within the statute of frauds; and the mischief would be the same, if parol evidence were let in, in order to shew how much of the contract was good, and how much was bad.

Rule discharged.

(*a*) Vide *ante*, 17. (*b*) 4 *Term Rep.* 320.

DOE, Lessee of REECE and Others, *against* ROBSON and Another.

Monday, Jan. 27th.

IN ejectment for a messuage in the parish of *St. Leonard, Shoreditch*, the question turned upon the validity of a lease granted under a power in a marriage settlement, given to *John Fotherby* and *Anne Colepepper*, when in possession respectively, to grant leases for any term not exceeding ninety-nine years, *to take effect in possession and not in reversion*. The lease in question *bore date the* 31*st of August*, 1770, and was granted by *John Fotherby* to *Stephen Robson*, habendum *from the* 29*th of September*, NOW NEXT ENSUING, for the term of ninety-nine years. At the trial before Lord *Ellenborough*, C. J. at *Westminster*, the lessors of the plaintiff, who were purchasers of the reversion, insisted upon the shew that the lease executed under a power to lease in possession and not in reversion, which lease bore date the 31st of *August* 1770, and purported to grant a term *from the* 29*th of* September *then next ensuing*, was not in fact executed till *after* the 29th of *September*, inasmuch as the charge for drawing and engrossing the lease was under the date of "*October* 1770."

Entries of charges made by an attorney in his books, shewing the time when a certain lease prepared for a client of his [33] was executed; which charges were shewn to have been paid; are evidence after the attorney's death, to

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DOE, Lessee of REECE, *against* ROBSON.

invalidity of this lease: it appearing from the date, coupled with the habendum, to be a lease in reversion, and not in possession. The defendants, who claimed under the lease, insisted that although it bore date on the 31st of *August*, 1770, yet it was not really executed and delivered until a period subsequent to that date. To prove this, they produced and tendered in evidence the books of Mr. *Strong*, deceased, who was proved to have been *Stephen Robson*'s attorney; the entries in which were all proved to be in the hand-writing of *Strong*. The first was his day-book, containing the following entry:

"*Fotherby* to *Robson*. Indentures of lease; *Sept.* 15." Then the journal journalizing from the day-book with the following entries: "1769, 1770. P. 30. *Stephen Robson*, *Long-Alley*, near *Moorfields*.

				s.	d.
"*Sept.* 15. Indentures of lease *Fotherby* to you			-	8	0
"*Oct.* 6. Parchment memorial	do.	-	-	0	4
"— 10. Paid registering		-	-	7	0"

Also the bill-book or ledger. "1770, *October*. Drawing and "engrossing lease from Mr. *Fotherby* to you, and counterpart, "and drawing and engrossing memorial thereof, and paid regis- "tering, 3*l*. 13*s*. 6*d*." It appeared that the above charges were paid. These entries were tendered in evidence to shew that the parchment materials upon which the lease was drawn were pur-
[34] chased, and the lease itself executed, subsequent to the 31st of *August*, the date of the lease. The evidence, though objected to, was admitted by Lord *Ellenborough*, C. J., and a verdict was thereupon found for the defendants.

Park now moved for a new trial, on the ground that the evidence was not admissible. He allowed that this question had been much considered in a late case of *Higham* v. *Ridgway* (*a*); but distinguished that case from the present, inasmuch as that was a question respecting the time of birth of a child, upon which evidence of reputation in the family is admissible; and therefore the books of the midwife, who must best know the fact, might be well received. But here the evidence was admitted upon a matter of which reputation is no evidence; namely, to shew that the date expressed in a deed was not the true time of its execution. He admitted that the case of *Warren* d. *Webb* v. *Grenville* (*b*) had gone farther; for there the charges made in the attorney's book were admitted to shew the surrender of a life estate, in order to support a subsequent recovery; and that that

(*a*) 10 *East*. 109. (*b*) 2 *Str*. 1129.

doctrine had been upheld by later decisions, as in *Roe* v. *Rawlins* (*a*). But he contended that the rule ought not to be relaxed too much.

Lord ELLENBOROUGH, C. J. The ground upon which this evidence has been received is, that there is a total absence of interest in the persons making the entries to pervert the fact, and at the same time a competency in them to know it. The impression on my mind is the same now as it was at the trial, that the evidence is admissible on the authority of the cases.

GROSE, J. concurred. [35]

LE BLANC, J. The case of *Roe* v. *Rawlins* was not a question of reputation, but whether the ancient rent was reserved by the tenant for life.

BAYLEY, J. It has long been an established principle of evidence, that if a party, who has knowledge of the fact, make an entry of it, whereby he charges himself, or discharges another upon whom he would otherwise have a claim, such entry is admissible in evidence of the fact, because it is against his own interest.

Rule refused.

(*a*) 7 *East*. 279.

CARRUTHERS and Another *against* GRAY.

Monday. Jan. 27th.

IN an action on a policy of assurance on goods, at and from *London* to the *Baltic*, which were lost by a peril insured against, the interest was averred in *J. E. Warburg* and *J. Oppenheimer*, and certain persons trading under the firm of *Wref* and *Schlasser*. And at the trial before Lord *Ellenborough*, C. J. at the sittings after last term at *Guildhall*, it appeared that after the ship was laden for the voyage by *Oppenheimer*, and the captain, who was also owner of the ship, had obtained his manifest and clearances at the custom-house, sixteen bales of goods belonging to the assured were put aboard by the packer of the goods, who had made all the entries necessary at the custom-house. It was thereupon objected that the captain should have made a second clearance; the sixteen bales not being comprised in his manifest, nor in the Content delivered by him. The plaintiffs however obtained a verdict; which *Scarlett* now moved to set aside, on the ground that the requisitions of the stat. 13 & 14 *Car*. 2. *c*. 11. were not complied with, and therefore, though the loss did not happen on this account, the assurance was vacated; it being a condition

It is no objection to the assured on goods recovering for a loss by a peril within the policy, that after the captain had obtained his manifest and custom-house clearances, as required by stat. 13 & 14 *Car*. 2. *c*. 11. *s*. 3. goods of the assured were put on board by the packer, who had previously made all [36] the necessary entries at the custom-house.

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implied in every policy that the ship should be documented and cleared out according to law. He admitted that there was no ground for imputing fraud to the assured, but contended that the provisions of the act had not been pursued. The 3d section enacts that no captain of any vessel shall take on board any *English* goods to be exported, until he shall have entered such ship in the book of the commissioners, customer, or collector, and comptroller outwards of such port where he shall take in goods, together with the name of such captain, the burden of such ship, the number of guns, and to what port she intends to sail; and before he shall depart with his ship out of such port, shall bring unto the said person who shall be appointed for managing the customs, the customer, or collector, and comptroller of such port, a Content in writing under his hand, of the names of every merchant and other person or persons that shall have laden and put on board any such ship any such goods, together with the marks and numbers of such goods, and shall likewise publicly in the open custom-house, upon his oath to the best of his knowledge, have answered to such questions as shall be demanded of him concerning the same. It is not enough therefore under this clause that the agent for the freighter has made the entries, unless the captain has also made them before he sails. The omission to do so makes the ship liable to seizure, and so increases the risk of the underwriter; and although the loss may not have arisen on
[37] that account, it will not make any difference (*a*). If the owner of the ship is to do an act, the omission of which alters the risk of the underwriter, that will avoid the policy: and it is the same where the assurance is upon goods. [Lord *Ellenborough*, C. J. Can you shew by the statute that the ship is seizable?] By the st. 12 *Geo.* 1. *c.* 28. *s.* 17. the officer, after entry of the goods (mentioned in that clause,) may search the bales, and if the goods be not rightly entered, may seize them, and the same are forfeited. [*Bayley*, J. Have you any case to shew that there is an implied warranty on the part of the assured on goods, that the ship shall be properly cleared out?] There is no case to that effect; but there is no case which makes a distinction in that respect between the assured on ship and the assured on goods.

Lord ELLENBOROUGH, C. J. It not only appeared on the part of the assured that there was no fraud, but also no negligence. The sixteen bales were included in one of the papers which was on board: the cocket was on board.

(*a*) *Law* v. *Hollingsworth*, 7 *Term Rep.* 160.

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LE BLANC, J. The utmost extent to which the argument can be carried is that if a loss had arisen in consequence of the omission, it might not have been a loss within the policy. But that is not the case here. The attempt to make the assured of goods liable upon the implied warranty of neutrality was made in *Bell* v. *Carstairs* (*a*) without success.

Per Curiam, Rule refused (*b*).

(*a*) 14 *East*, 374. (*b*) See *Atkinson* v. *Abbott*, 11 *East*, 135.

PICKERING *against* BUSK and Another, Assignees of HAYWARD and Another, Bankrupts.

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Monday, Jan. 27th.

TROVER for hemp. At the trial before Lord *Ellenborough*, C.J. at the sittings after *Trinity* term in *London*, it appeared that *Swallow*, a broker in *London*, engaged in the hemp trade, had purchased for the plaintiff, a merchant at *Hull*, a parcel of hemp then lying at *Symonds'* wharf in *Southwark*. The hemp was delivered to *Swallow*, at the desire of the plaintiff, by a transfer in the books of the wharfinger from the name of the seller to that of *Swallow*. Shortly afterwards *Swallow* purchased for the plaintiff another parcel of hemp, lying at *Brown*'s quay, *Wapping*, which latter parcel was transferred into the names of *Pickering* (the plaintiff), *or* Swallow. Both these parcels of hemp were duly paid for by the plaintiff. *Swallow*, however, whilst the hemp remained thus in his name, having contracted with *Hayward* and Co. as the broker of *Blackburn* and Co. for the sale of hemp, and having none of his own to deliver, transferred into the names of *Hayward* and Co. the above parcels in satisfaction of that contract, for which they paid him the value. *Hayward* and Co. shortly after became bankrupts; and the plaintiff, discovering these circumstances, demanded the hemp of the defendants their assignees, and upon their refusal to deliver it the present action was brought. His Lordship was of opinion upon this evidence, that the transfer of the hemp, by direction of the plaintiff, into *Swallow*'s name, authorized him to deal with it as owner, with respect to third persons; and that the plaintiff, who had thus enabled him to assume the appearance of ownership to the world, must abide the consequence of his own act. A verdict was thereupon found for the defendants, with liberty to the plaintiff to move to set it aside.

Where a purchaser of hemp lying at wharfs in *London* had, at the time of his purchase, the hemp transferred in the wharfinger's books into the name of the broker who effected the purchase for him, and whose ordinary business it was to buy and sell hemp; this was held to give the broker an implied authority to sell it, and that his sale and receipt of the money bound his unknown principal. So if it be transferred into the names of "*P.* or *S.*" that is, of the principal or broker.

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The Attorney-General in the last term accordingly moved for a new trial, on the ground that the principal in this case, by

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authorising the transfer to be made in the name of his broker, had done no more than was usual and notorious in the course of that business, and therefore gave no authority to the broker, his agent, to transfer the property without his direction. Where by the ordinary course of trade the possession of goods is left with an agent, he cannot dispose of it as his own, but the purchaser must look to his authority. Such is the case of a factor, who by the usage of trade has authority to sell, but not to pledge. Therefore though he, like the broker in this case, be the apparent owner, yet his pledge will not bind the principal. As in *M'Combie* v. *Davies (a)*, where an assignment of tobacco in the King's warehouse had been taken by way of pledge from the broker who had purchased it there in his own name for his principal, it was held that the pawnee could not retain it against the principal.

The Court now distinguished between that case, which was the case of a *pledge*, and beyond the scope of a broker's general authority; and this, which was the case of a sale and within his general authority; but they granted a rule to shew cause, as the point was of general consequence.

[40] *Garrow*, *Topping* and *Taddy*, now shewed cause, and observed, that *Hayward* and Co. who purchased the hemp of *Swallow*, had no means of discovering that the hemp was not the property of the person in whose name it stood, and who took upon him to deal with it as his own. And it would be unjust that, because the broker has turned out to be an unfaithful steward of his employer, the innocent purchasers should suffer rather than the plaintiff, by whose act in suffering the goods to be entered in the broker's name, the latter was enabled to practise the delusion. If the plaintiff had meant to retain his dominion over the property, he should have taken the transfer in his own name instead of the broker's. *M'Combie* v. *Davies (b)* was the case of a pledge, and only decides that a broker cannot *pledge* the goods of his principal; which doctrine was before laid down in *Paterson* v. *Tash (c)*, in the case of a factor. But here *Swallow* has made an absolute sale; which he had an apparent authority to do: and according to *Parker* v. *Patrick (d)*, the owner, who has enabled another person to deal with the goods as his own, must abide the consequence if any loss occur by third persons' dealing with such apparent owner. [*Bayley*, J. That doctrine in its full extent would give the pawnee in all cases a better title than the original proprietor.]

(*a*) 6 *East*, 538. and 7 *East*, 5. (*b*) 6 *East*, 538.
(*c*) 2 *Str.* 1178. and vi. *Daubigny* v. *Duval*, 5 *Term Rep.* 604.
(*d*) 5 *Term Rep.* 175.

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The Attorney-General, Park, and *Abbot,* contrà. The question is whether the property in the hemp passed by the sale and delivery of *Swallow.* The cases of *Paterson* v. *Tash,* and *M'Combie* v. *Davies,* establish the principle, * that if an agent go beyond his authority in disposing of the goods of another, that other is not bound by such an excess of authority: on that ground only has it been held, that a factor cannot pledge; because his principal has given him no authority to pledge: but he may *sell,* because his principal entrusts him with an authority to sell. How then can a broker, who has no authority either to sell or pledge, bind his principal by a sale? [Lord *Ellenborough,* C.J. If *Swallow* had not the hemp for the purpose of sale, for what purpose had he it?] For the purpose of safe custody, and for the convenience of the owner. The world had no right to conclude from the circumstance of the goods being in his name, that therefore he had the power of disposing of them. The argument, that the property in goods should follow the possession, might have weight, if the question were whether the law should be altered in this respect: but that such is not the rule of law is clear from the *excepted* case of a sale *in market overt,* by which alone the property of another is bound. If a person entrust his watch to a watchmaker for the purpose of repairing it, and he sell it, the owner is not bound by such sale, because he had given no authority to sell. [Lord *Ellenborough,* C.J. In that case the watchmaker is not exhibited to the world as the owner, and the world does not credit him as such merely by reason of his possession of the property. But here *Swallow* was a common agent for the sale of property of this description.] Unless *Swallow* had the power of sale expressly given him, no such power can be implied from the mere fact of the goods being entered in his name at the wharfs. It does not follow that he who permits the possession of property by another therefore gives him an authority to dispose of it, though that other may deal in goods of the same kind. If one entrust a chest of tea, for the purpose of safe custody, to a grocer who deals in such commodity, and whom the world therefore might suppose to have the property in the chest, and he sell it; the chest remaining unbroken; without doubt the owner may recover it from the vendee; for the grocer was only entrusted with the custody, and in cases of this kind the rule of caveat emptor applies. So where goods are consigned to a merchant from abroad, the consignee cannot go beyond his authority in disposing of them; and yet he may have the full possession of them either by delivery of the

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goods themselves or of the bills of lading (*a*), and may thereby impose on the world. The principle of all which cases is this, that a person who is entrusted with the goods of another can do no more in respect of those goods than what the other has authorized him to do. Whether *Swallow* had power to sell is a fact, and not an inference of law arising out of the apparent possession: but no such fact was proved or found in this case. The only distinction between this and the case of a factor is that the factor has some authority; that is, to sell; but here *Swallow* had none. In *Wilkinson* v. *King* (*b*), which was trover for lead, it appeared that the plaintiff had sent the lead to a wharfinger who was accustomed to sell lead: and he sold it to the defendant, who bought it bonâ fide: yet it was held that the plaintiff was entitled to recover. [Lord *Ellenborough*, C.J. That was the case of a wharfinger, whose proper business it was not to sell; and to whom the goods were sent for the mere purpose of custody.] The case states that he was accustomed to sell lead.

[43] Lord ELLENBOROUGH, C.J. It cannot fairly be questioned in this case but that *Swallow* had an implied authority to sell. Strangers can only look to the acts of the parties, and to the external indicia of property, and not to the private communications which may pass between a principal and his broker: and if a person authorize another to assume the apparent right of disposing of property in the ordinary course of trade, it must be presumed that the apparent authority is the real authority. I cannot subscribe to the doctrine, that a broker's engagements are necessarily and in all cases limited to his actual uthority, the reality of which is afterwards to be tried by the fact. It is clear that he may bind his principal within the limits of the authority with which he has been apparently clothed by the principal in respect of the subject-matter; and there would be no safety in mercantile transactions if he could not. If the principal send his commodity to a place, where it is the ordinary business of the person to whom it is confided to sell, it must be intended that the commodity was sent thither for the purpose of sale. If the owner of a horse send it to a repository for sale, can it be implied that he sent it thither for any other purpose than that of sale? Or if one send goods to an auction-room, can it be supposed that he sent them thither merely for safe custody? Where the commodity is sent in such a way and to such a place as to exhibit an apparent purpose of sale, the principal will be bound, and the

(*a*) *Newsom* v. *Thornton*, 6 *East*, 17. (*b*) 2 *Campb. N. P. Cas.* 335.

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purchaser safe. The case of a factor not being able to pledge the goods of his principal confided to him for sale, though clothed with an apparent ownership, has been pressed upon us in the argument, and considerably distressed our decision. The Court, however, will decide that question when it arises, consistently with the principle on which the present decision is founded. It was a hard doctrine when the pawnee was told that the pledger of the goods had no authority to pledge them, being a mere factor for sale; and yet since the case of *Paterson* v. *Tash*, that doctrine has never been overturned. I remember Mr. *Wallace* arguing in *Campbell* v. *Wright* (*a*), that the bills of lading ought to designate the consignee as factor, otherwise it was but just that the consignors should abide by the consequence of having misled the pawnees. The present case, however, is not the case of a pawn, but that of a sale by a broker having the possession for the purpose of sale. The sale was made by a person who had all the indicia of property: the hemp could only have been transferred into his name for the purpose of sale; and the party who has so transferred it cannot now rescind the contract. If the plaintiff had intended to retain the dominion over the hemp, he should have placed it in the wharfinger's books in his own name.

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GROSE, J. The question, whether the plaintiff is bound by the act of *Swallow*, depends upon the authority which *Swallow* had. This being a mercantile transaction, the jury were most competent to decide it; and if I had entertained any doubt, I should rather have referred the question to them for their determination: but I am perfectly satisfied: I think *Swallow* had a power to sell.

LE BLANC, J. The law is clearly laid down, that the mere possession of personal property does not convey a title to dispose of it; and, which is equally clear, that the possession of a factor or broker does not authorize him to pledge. But this is a case of sale. The question then is whether *Swallow* had an authority to sell. To decide this, let us look at the situation of the parties. *Swallow* was a general seller of hemp: the hemp in question was left in the custody of the wharfingers, part in the name of *Swallow*, and part in the name of the plaintiff *or* Swallow, which is the same thing. Now for what purpose could the plaintiff leave it in the name of *Swallow*, but that *Swallow* might dispose of it in his ordinary business as broker: if so, the broker having sold the hemp, the principal is bound. This is distinguished from all the

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(*a*) 4 *Burr.* 2046.

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cases, where goods are left in the custody of persons, whose proper business it is not to sell.

BAYLEY, J. It may be admitted that the plaintiff did not give *Swallow* any express authority to sell; but an implied authority may be given: and if a person put goods into the custody of another, whose common business it is to sell, without limiting his authority, he thereby confers an implied authority upon him to sell them. *Swallow* was in the habit of buying and selling hemp for others, concealing their names. And now the plaintiff claims a liberty to rescind the contract, because no express authority was given to *Swallow* to sell. But is it competent to him so to do? If the servant of a horse-dealer with express directions not to warrant, do warrant, the master is bound; because the servant, having a general authority to sell, is in a condition to warrant, and the master has not notified to the world that the general authority
[46] is circumscribed. This case does not proceed on the ground of a sale in market overt, but it proceeds on the principle that the plaintiff having given *Swallow* an authority to sell, he is not at liberty afterwards, when there has been a sale, to deny the authority.

Rule discharged.

Tuesday, Jan. 28th.

HORNEYER *against* LUSHINGTON.

Where immediately upon the arrival of a ship at *Riga*, her papers were taken and her hatches sealed down by the officers of government, and so kept till her papers were sent to *St. Petersburgh* to be examined; and on such examination immediate orders were issued for the seizure of the ship and cargo, which were afterwards condemned for carrying simulated papers; held that this was not a mooring 24 hours in *safety* after her arrival, within those words in the policy. But that as the ship had not leave to carry simulated papers, although without such she would certainly have been seized and condemned, as coming from an enemy's country; the underwriters were not liable for the loss which ensued from the act of the assured himself. A policy of insurance on goods "at and from *Gottenburgh* to *Riga*, beginning the adventure on the goods *from the loading thereof aboard the ship at* Gottenburgh," will not cover goods previously loaded on board at *London*, which arrived in the ship at *Gottenburgh*.

ASSUMPSIT on a policy of assurance, "lost or not lost, *at and from Gottenburgh to Riga*, or any ports in the *Baltic*, upon goods and ship *Amelia;* beginning the adventure upon the goods *from the loading thereof aboard the said ship at Gottenburgh;*" with a memorandum declaring the insurance to be 3500*l.* on the cargo, and 1000*l.* on the ship. The declaration, after setting forth the policy, (which did not contain any liberty to carry simulated papers,) averred that on the 13th of *September* 1809, the ship was in good safety at *Gottenburgh*, and that the cargo in the policy and memorandum mentioned was of great value; and that afterwards the ship, with the cargo, set sail from *Gottenburgh*, and arrived at *Riga*, where with the cargo she was taken, arrested, re-

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strained, and detained by the Emperor of *Russia*, and wholly lost. The declaration also contained the usual money counts. At the trial before Lord **Ellenborough*, C. J. at the *London* sittings after last *Trinity* Term, it appeared that the goods insured were laden on board the ship in the port of *London*. She sailed with a licence, and took on board simulated papers representing that she came from *Berghen* in *Norway*; (*Sweden* being then at war with *Russia*.) She arrived at *Gottenburgh*, from whence, after receiving orders, she proceeded to and arrived at *Riga*, where her papers were taken, and her hatches immediately sealed down by the government officers until her papers could be sent to *St. Petersburgh* to be examined; and, on such examination, orders were immediately sent to *Riga* to seize the ship and cargo; which was done; and she was afterwards condemned with her cargo, on the ground of having simulated papers on board. This, Lord *Ellenborough* held, was not a mooring twenty-four hours *in safety*, there having been an incipient seizure immediately on her arrival, which ended in her condemnation. And the case of *Waples* v. *Eames* (*a*) was cited, where Lord C. J. *Lee* had ruled that "moored twenty-four hours *in good safety*, meant such a mooring as gave the ship the opportunity of unloading and discharging her cargo." At the same time the case of *Bell* v. *Bell* (*b*) was also mentioned. It was then objected on the part of the defendant, that the policy containing no leave to carry simulated papers, and the ship notwithstanding having carried them, and been condemned on that very ground, the plaintiff could not recover for a loss of which he himself had been the efficient cause. To which it was answered that as the ship and cargo must necessarily have been confiscated if she had gone to *Riga* without simulated papers, (*Sweden* being at war with *Russia*,) the carrying of them was for the protection of the risk, and for the benefit of the insurer; and therefore within the general scope of the policy, though not within the particular words of it; in like manner as hoisting the enemy's flag, in sight of the enemy, in endeavouring to avoid capture, is no fraud upon the underwriters. It was contended however, on the part of the plaintiff, that at all events he was entitled to a return of the premium in respect of the goods, the insurance being *from the loading thereof at Gottenburgh*; as it appeared that there were no goods laden at *Gottenburgh*, but only at *London*: the risk therefore as to the goods insured never attached. Lord *Ellenborough*, C. J. directed the jury to find a

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(*a*) 2 *Stra.* 1243.

(*b*) 2 *Camp. N. P. Cas.* 475. The question there arose upon the period when the homeward risk commenced.

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verdict for the defendant; reserving liberty to move to enter a verdict for the plaintiff on both the points; which the *Attorney-General* accordingly did in the last term; when the Court, after much discussion, refused a rule nisi upon the first point, and granted it on the latter point only, upon which the case of *Spitta* v. *Woodman* (*a*) was mentioned.

With respect to the first point, the *Attorney-General* argued that though the sentence of condemnation was conclusive as to the fact of the ship's having carried simulated papers, it did not shew that it was unlawful for the *Swedish* owner to do so, as between him and the *British* underwriters. The latter knew at the time of subscribing the policy from *Gottenburgh* to *Riga*, that there was war between *Sweden* and *Russia*; and yet they insured the risk generally, without any stipulation; relying on the assured's using all the
[49] ordinary precautions to avoid danger, and lessen the risk, of which this of carrying simulated papers is one of the most notorious. And if the *Swede*, being his own insurer, would thus have endeavoured to deceive his enemy, in order to protect his property; the *British* underwriters would have had occasion to complain if he had omitted the same precaution when the risk was cast upon them: there being no term in the policy against it.

Lord ELLENBOROUGH, C. J. then said, I do not pronounce whether the carrying of simulated papers was or was not an enhancement of the risk insured; but my opinion is founded on the effect of the sentence of condemnation, which has proceeded upon the mere personal act of the assured in carrying such papers, which it treats as a crime; and which act is thereby proved to have been the efficient cause of the loss, the very ground of the condemnation. How then can the underwriter be answerable for a loss which happened from an act of the assured done without his leave? The other Judges concurred with his Lordship in this opinion.

Garrow and *Campbell* now shewed cause on the other point. After a party has by his own act caused the loss of the goods, he cannot be permitted to demand a return of premium. But if that be no objection; here the policy being on the ship and goods, the premium in respect of the latter cannot be apportioned; and if it could, inasmuch as the ship with the goods on board was *at Gottenburgh*, that is a sufficient inception of the risk, and therefore the plaintiff is not entitled to any return. The case
[50] of *Hodgson* v. *Richardson* (*b*) will not govern the present; for

(*a*) 2 *Taunt.* 416. (*b*) 1 *Bl. Rep.* 463.

although that was an insurance at and from *Genoa* to *Dublin*, and it appeared that the cargo had been put on board at *Leghorn*, and not at *Genoa;* yet the underwriter was not held to be discharged on that ground, but on the ground of concealment of material circumstances respecting the probable condition of the cargo. Neither does the case of *Robertson* v. *French* (*a*) decide this question; the Court having there only determined that a cargo laden at the *Cape of Good Hope*, before the ship's arrival "on the coast of *Brazil*," was not a cargo loaded on board "on the coast of *Brazil*," within the words and meaning of the policy on the *return* voyage. *Spitta* v. *Woodman* (*b*) in *C. B.* is certainly a decision against the defendant; but it has not been considered as conclusive; for the point has been again reserved in *Langhorn* v. *Hardy*, at the last sitting before the Chief Justice of that Court.

The Attorney-General, contrà. The policy never attached on the goods, and therefore the plaintiff is entitled to a return of premium. *Spitta* v. *Woodman* has expressly decided the point. It was, like the present, an insurance on goods at and from *Gottenburgh*, beginning the adventure *from the loading thereof on board*, without saying where: and it also appeared that when the policy was effected, the underwriter knew that the goods were laden at *London*, and not at *Gottenburgh:* so that it was a much stronger case than the present to charge the underwriter with the risk, if by law it could have been done. But the Court notwithstanding thought they could only look to the written contract between the parties.

Lord ELLENBOROUGH, C. J. When this quesion was first agi- [51]
tated, I had a difficulty in putting the construction, which is now contended for, on words which I really believe bore a different construction in the commercial understanding of those who used them. However the Court came to a decision on the point in the case of *Robertson* v. *French;* and this question now comes before us after the case of *Spitta* v. *Woodman*. It is therefore no longer to be doubted what construction is to be put upon these words. It is to be considered also in aid of such construction, that the goods may have been damaged in their transit from *London* to *Gottenburgh*, which might cast upon the underwriter a damage occurring anterior to the commencement of the risk. It seems to me therefore, that under the terms of this policy, the risk upon the goods never commenced, and there must be therefore a proportional return of the premium.

(*a*) 4 *East*, 130. (*b*) 2 *Taunt.* 416.

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GROSE, J. concurred.

LE BLANC, J. A different construction would at all events make the risk commence on the arrival of the ship at *Gottenburgh*, instead of from the loading of the goods there, which is the time specified in the policy.

BAYLEY, J. In *De Symonds* v. *Sheddon* (*a*) the Court of Common Pleas seem to have entertained the same opinion.

Rule absolute (*b*).

(*a*) 2 *Bos. & Pull.* 153. (*b*) See *post*.

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Tuesday, Jan. 28th.

SCROEDER and Another *against* VAUX.

Though it should be doubtful whether the stat. 48 *Geo.* 3. c. 37. empowering his Majesty, by order in council, to permit during the war, &c. the importation of such goods as shall be *specified* therein from any place from which the *British* flag is excluded in any foreign vessel, authorizes an order in council, licensing a *British* merchant, *in general terms*, to import a cargo "*of such goods as are permitted by law to be imported*, (*except* German *linens, stock-fish,*

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and oil;" yet an importation into *Great Britain* from a port of *Russia*, under such a licence, of such lawful goods in a neutral *Hamburgh* ship was held to be authorized by the stat. 49 *G.* 3. c. 60. which makes it lawful under any order of council already issued or to be issued, to import from any part of *Europe* or *Africa*, in any *British* or other ship of an alien friend, in any manner navigated, *any goods which may be lawfully imported*, the growth or produce of any country, on payment of duties, &c.; and therefore an insurance on such goods for the voyage is legal. And such insurance is valid notwithstanding the licence was limited to be in force until the 29th of *September*, and the ship did not sail from the foreign port till the 24th of *October*; it appearing that the goods were loaded on board by the 12th of *September*, and the adventure was then bonâ fide prosecutingr unde the licence, and the policy attaching *at* and from her loading port.

THIS was an action on a policy of assurance on ship valued at 5000*l.* and 5000*l.* on *wheat*, at and from *Archangel* to her port of discharge in *Great Britain*. The interest was averred to be in *Peter* and *Samuel Claussen*, and the loss by the perils of the sea. At the trial before Lord *Ellenborough*, C. J. at the *London* sittings after last *Trinity* term, a verdict was found for the plaintiff; with liberty to the defendant to move to enter a nonsuit on the first ground after mentioned.

Best, Serj. moved accordingly in the last term upon the following facts. Messrs. *Claussen* and Co. were resident at *Hamburgh* at the time when the policy was effected, and the ship insured was a *Hamburgh* ship. In *October* 1810, she sailed from *Archangel* with a cargo of wheat loaded on board at that place, to be brought to this country; and with a licence dated the 17th of *February* 1810, which was granted in pursuance of an order of council of the same date, issued to *E. Stein* of *London*, merchant, on behalf of himself and others, to permit a vessel, bearing any flag except the *French*, to proceed in ballast from any port north of the *Scheldt* to *Archangel*, or any other port in the *White Sea*, there to load *a cargo of such goods as are permitted by law to be imported* (*except* German *linens, stock-fish, and oil,*) and to proceed with the same to a port of the united kingdom, &c. Thereupon he contended that as by the stat. 12 *Car.* 2. *c.* 18. *s.* 8. the importation

into this country of goods of the growth or produce of another is prohibited, except in *British* or such foreign ships as are of the country of which the goods are the growth or produce: and as the stat. 48 *G.* 3. *c.* 37. *s.* 3. which empowers his Majesty, by his licence, to dispense with the above prohibition, requires that the goods thereby permitted to be imported shall *be specified* in the said licence; to which requisition the licence in the present case did not conform: therefore the importation was illegal, and the policy to cover it was void. He also mentioned another ground of objection, which had been made and overruled at the trial; that the licence was only to be in force until the 29th of *September* 1810; but though she was loaded by the 12th of that month, yet she did not attempt to sail till the 4th of *October*.

The Court however refused to grant a rule to shew cause upon this latter point, and granted it upon the first point only. Lord *Ellenborough*, C. J. said, I cannot think upon the fair meaning of the licence that the whole voyage must be concluded within the time specified in it. It was never intended that if the adventure licensed were bonâ fide prosecuted within any part of the time mentioned, it should become illegal, because by some accident the voyage was protracted beyond that period. Now here the adventure had substantially commenced by the loading of the goods on board, and the policy, which is *at* and from *Archangel* had lawfully attached, and the adventure was under the protection of the policy within the period specified in the licence; and it [54] would be a monstrous conclusion to draw from the specification of the time which is introduced for the purpose of describing the adventure intended to be licensed, that after it had been lawfully begun and prosecuted, the non-arrival of the ship till the day after the time mentioned in the licence had expired should illegalize the voyage, so as to avoid the policy in case the ship were lost immediately on her arrival.

The Attorney-General, Garrow and *Park*, now shewed cause against the rule upon the first point; and contended that the licence did in effect make such a specification of the goods to be imported as the statute required; the true construction of which was not that every article should be enumerated, but that a general description should be given of the goods in the licence. This construction may be collected from the utter impossibility of the merchant applying for the licence to know beforehand what goods the foreign market will supply, and his consequent inability to enumerate them. This has given rise to the shorter and only practicable course of specifying all goods lawfully importable,

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except certain articles; which is tantamount to a specific enumeration of all other importable articles. 2dly, They contended that the defect, if any, was cured by the stat. 49 *G.* 3. *c.* 60., which makes it lawful, under any order of council already issued or to be issued, to import into the united kingdom from any part of *Europe* any goods or commodities which may be lawfully imported: and sect. 2. enacts that every importer of goods from any part of *Europe*, under any order of council which has already issued,
[55] and which would have been warranted by this act, shall be deemed and taken to be good in law, in the same manner as if such order had been issued in pursuance of this act. Since the passing of this statute therefore no specification is required.

Topping and *Scarlett*, (with *Best*, Serjt.) insisted that the general description in the licence was insufficient to satisfy the words of the stat. 48 *Geo.* 3. *c.* 37.: that in truth the only goods specified in the licence were those excepted out of it's operation, which could never be deemed to be a specification of those included in it; and without such a specification, no information of the nature of the cargo intended to be imported is communicated to the government, and one of the checks meant to be imposed upon the misapplication of licences is taken away. 2dly, That the effect of the stat. 49 *Geo.* 3. *c.* 60. upon this licence was not relied upon at the trial; neither had the statute relation to any such special orders of council as those granted to individuals, which were sufficiently regulated before; but must be taken to apply only to such general orders of council as authorized all his Majesty's subjects to act thereon without a particular licence. The latter statute does not even speak of licences.

Lord ELLENBOROUGH, C. J. It does not appear to me that the act of the 49 *G.* 3. is particularly limited in its application to any certain description of orders in council, but relates not only to those general orders which affect the whole community, but to those which are specially granted upon the petition of an individual. The statute speak of orders already issued or to be issued, and virtually incorporates prospectively, as well as by
56] relation back, every order of council authorizing importation that may have been issued. Now here is an order of council, under which a licence is granted to import into this kingdom from certain parts of *Europe*, a cargo of such goods *as are permitted by law to be imported*, with the exception of certain articles therein enumerated. If the case had stood on the stat. 48 *G.* 3., I should have doubted whether that was a sufficient specification of the goods allowed to be imported, considering the licence as an in-

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strument to be acted upon, and to be the guide of merchants as well as lawyers. But we are relieved from that consideration by the latter statute, which sanctions every importation of goods under any order of council which would have been authorized by that act. Now that act authorizes the importation of any goods which *may be lawfully imported;* so that the licence in this case complies with the very terms of the statute. It seems to me, therefore, there being no words of restriction used, that the statute applies to every order of council, and that the present case is within it.

LE BLANC, J. Under the stat. 49 *G.* 3. the question does not admit of a doubt; because that act applies to all orders of council. It is unnecessary to consider what the question might have been under the statute 48 *G.* 3.

Per Curiam, Rule discharged.

The KING *against* The Inhabitants of the Township of GISBURN.

[57]

Wednesday Jan. 29th.

Upon appeal against an order of removal, the appellant township having produced one of its inhabitants as a witness, who being examined upon the voir dire stated that he was th occupier of a cottage there of the annual valne of 25 shillings, but that he was not rated to nor paid any public rate or tax; such answer must be taken to be true for the purpose; and it cannot be objected to his examination in chief, that the best evidence of the fact was not given, by the production of the rate itself.

BY an order of two justices, *Thomas Roberts,* his wife and children, were removed from the township of *Colne* to the township of *Gisburn,* both in the county of *Lancaster;* which order was confirmed on appeal to the sessions, subject to the opinion of this Court on the following case.

On hearing the appeal, the appellants called a witness, who, being examined on the voir dire, stated as follows: that he is the occupier of a cottage in the appellants' township of the annual value of 25*s.*, but that he has never been charged with or paid any public rate or tax in that township. It was objected on the part of the respondents, that the witness could not be examined, without producing the rate to shew that he was not rated: and as no rate was produced, the Court rejected the witness.

Scarlett, (and *J. Williams,*) in support of the order of sessions, contended that the witness was properly rejected. The practice of the sessions has been to require the parish, that produces its own parishioner as a witness in its behalf, to produce also the rate-book as the best evidence to shew that he is not rated: which seems reasonable; because the opposite party, having no means of knowing beforehand that an occupier in the adverse parish is intended to be called as a witness, cannot be prepared to prove him rated, by giving their opponents notice to produce the rate. [Lord *Ellenborough,* C. J. said that the practice might be con-

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venient; but the question submitted to the Court was whether the law required it.] It has been decided that the fact of rating cannot be proved without the production of the rate; for which Lord *Kenyon*, C.J. assigned the true reason, that the best evidence was not given which the nature of the thing would admit of (*a*). So here it appears that the witness has rateable property; and it is therefore to be presumed that the overseers have done their duty and rated him, unless that be rebutted by the best evidence of his being not rated, namely, the production of the rate itself.

Lord ELLENBOROUGH, C.J. There is no question before this Court but the competency of the witness upon the voir dire. What he answers must be taken for better and worse. If he answer falsely, he may be indicted for perjury.

Per Curiam, The case was remitted to the Sessions.

Littledale was to have opposed the order.

(*a*) *Rex* v. *The Inhabitants of Coppull*, 2 *East*, 25.

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Wednesday, Jan. 29th.

The KING *against* The Inhabitants of SHEEPSHEAD.

Since the act of the 32 *Geo.* 3. *c.* 57. for the regulation of parish apprentices, which recites that *on the death of the master during the term of such apprenticeship, the agreement for service on the part of the apprentice is at an end*, but the covenant for maintenance on the part of the master still continues as far as his assets extend, or doubts have arisen with respect thereto, &c.; and then enacts that such covenants for maintenance of parish apprentices, with whom no more than 5*l.* shall be given, shall not continue in force longer than for three calendar months after the death of the master, &c. during which three months the apprentice shall continue to serve the executors, &c. or their appointee: and that within the three months two justices of the peace, on application of the widow or certain relatives of the master, may by indorsement on the indenture, &c. direct such apprentice to serve out his time with the applicant, such applicant having lived with and been part of the family of the master, &c. at his death: but otherwise, that such apprenticeship shall be determined: and then it provides (*s.* 5.) *that nothing thereinbefore contained shall extend to any parish apprentice but to such only as shall be living with and make part of the family, or be in the actual employment of the original master, &c. or of any subsequent master, &c. appointed under the provisions of the act at the time of the death of such master, &c.*:

Held that a parish apprentice who was not living at the time of his mistress's death with her *appointee under the provisons of the act*, though living with her son by her individual consent, could not gain a settlement in another parish by serving another mistress *with the consent of the son and assignee* of the original mistress, given *after the death of the original mistress*; the contract of service being declared by the recital of the act to be at an end upon the death of the original mistress, unless continued in the manner described in the 2d, 3d, and 4th sections of the act; to which sections the proviso in the 5th section seems properly to apply.

UPON and appeal against an order of two justices, removing *Thomas Lees* from the parish of *Sheepshead*, in *Leicestershire*, to the parish of *Uttoxeter* in *Staffordshire*, the sessions quashed the order, subject to the opinion of the Court upon the following case.

The pauper was put out apprentice by a parish indenture, dated 19th of *April* 1788, by the parish officers of *Uttoxeter*, with the consent of two justices, to *Mary Rawlins*, of *Stramshall* in *Uttoxeter*, and served her there from that time for 3 or 4 years till

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March 1791, when she gave up the farm to her son, who agreed to take the apprentice into his service and keep him: and Mrs. *Rawlins* was to have nothing more to do with him. This was previous to the passing of the stat. 32 *G.* 3. *c.* 57. During the time he lived with the son, Mrs. *Rawlins* died; and the pauper continued some time longer with the son in *Uttoxeter*, serving him; when *John Rawlins* told the pauper he might do what he could for himself, and if he could not get a good place, he would get one for him. The pauper then went and hired himself for 51 weeks to Mrs. *Phillips*, in the parish of *Field*. *John Rawlins*, on being informed by the pauper that he had so hired himself, asked the pauper what sort of a place it was that he had got; and on the pauper's describing it as a good place, *John Rawlins* said he was glad it was a good place, and he might go thither. The pauper went into Mrs. *Phillips*'s service, staid above 40 days with her, and *John Rawlins* gave him a suit of clothes at that time. When the pauper left Mrs. *Phillips*, he sent his wife to *John Rawlins* for his indentures, and they were delivered to her. The respondents contended that there was no service under the indentures so as to gain a settlement at *Field*. The sessions were of opinion that there was an express consent given by *John Rawlins* to the service of the apprentice with Mrs. *Phillips*.

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Jervis and *Hunter*, in support of the order of sessions, contended, first, that the sessions had found an express consent on the part of *John Rawlins* to the service of Mrs. *Phillips*, which was a question for their determination; and that their finding was authorized by the cases of *The King* v. *Bradstone* (*a*), *The King* v. *The Holy Trinity* (*b*), and *Rex* v. *Shebbear* (*c*). 2dly, The consent of the original mistress to that service was unnecessary, it having been before given to the service with her son: it was so decided in *Rex* v. *Clapham* (*d*). 3dly, The death of the original mistress, before the consent of the son to the latter service, made no difference; because at that time the son must be considered as the master. *Rex* v. *East Bridgford* (*e*) and *Rex* v. *Tavistock* (*f*). The stat. 32 *G.* 3. *c.* 57., passed since those cases were decided, does not apply to the present. [Lord *Ellenborough*, C. J. said that there was no need to cite cases to shew that after one assignment of the apprentice, every assignee may go on assigning ad infinitum: there were cases enough to that effect. But the question here was how far that statute has altered the law. His lordship asked if there were any cases since the statute.]

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(*a*) 2 *Bott.* 434. (*b*) 3 *Term Rep.* 605. (*c*) 1 *East*, 73.
(*d*) *Burr. S. C.* 266. (*e*) *Ib.* 133. (*f*) *Ib.* 578.

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To which it was answered that there were none; but that the provisions of that statute did not affect the present case (*a*). It enacts "that upon the death of any master or mistress of a parish apprentice during the term of such apprenticeship, the covenant in the indenture for the maintenance of the apprentice shall not continue in force longer than three months after the death of such master or mistress." But by *s.* 5. there is a proviso, that nothing before contained in the act shall extend to any parish apprentice, but to such only as shall be living with and make part of the family, or be in the actual employment of such original master or mistress, or of any subsequent master or mistress appointed under that act at the time of the death of any such masters or mistresses respectively. Now here the pauper was neither living with nor part of the family of Mrs. *Rawlins* at the time of her death, nor of any subsequent master or mistress appointed under the act.

Dayrell, contrà, was stopped by the Court.

[62] Lord ELLENBOROUGH, C. J. The words "subsequent master or mistress, mean such as become so by the provisions of the statute: it is the service under the authorized substitution that the act applies to. But how is the substitution by the party a substitution under the act? If it had not been for the act I should have been with the appellants.

Per Curiam, Order of Sessions quashed.

(*a*) But see the preamble to the statute, and quære whether it is reconcileable with the former cases referred to.

Friday, Jan. 31st.

PATERSON and Another *against* GANDASEQUI.

If the seller of goods, knowing at the time that the buyer, though dealing with him in his own name, is in truth the agent of another, elect to give the credit to such agent, he cannot afterwards recover the value against the known principal: but if the principal be not known at the time of the purchase made by the agent, it seems that when discovered, the principal or the agent may be sued, at the election of the seller; unless where, by the usage of trade, the credit is understood to be confined to the agent so dealing; as particularly in the case of principals residing abroad.

THIS was an action for goods sold, and upon the common money counts. At the trial before Lord *Ellenborough*, C. J. at the *London* sittings after last *Trinity* term, the following facts appeared. The defendant was a *Spanish* merchant, and a director of the *Phillippine* trading company at *Madrid*, with which he was engaged in adventures to a large amount. In *January* 1810, being then in *London*, he employed Messrs. *Larrazabal* and Co. of *London*, merchants, to purchase for him various assortments of goods for the foreign market, for which they were to charge a

commission of 2 *per cent*. *Larrazabal* and Co. accordingly applied to the plaintiffs, requesting them to send to their counting-house an assortment of silk hose with their terms and prices. *Paterson*, jun. waited on them at the time and place appointed, with the patterns, terms, and prices; at which time the defendant was present at the counting-house, and the samples were handed over [63] to him. He inspected them, and selected such articles as he required; and the terms and prices were also shewn to him and left there. On the 6th of *January* the plaintiffs received from *Larrazabal* and Co. an order in writing for 574 dozen of silk hose, to be ready in town on or before the 20th of *February* next, the payment as agreed upon: (Signed) *Larrazabal, Menoyo,* and *Trotiaga;* and shortly after another order for 150 dozen more, with the like signature. Both these orders were given by *Larrazabal* and Co. for the use of and in execution of the orders received by them from the defendant. The goods were sold by the plaintiffs on the credit of *Larrazabal* and Co., the invoices were made out in their names and sent to them, and *Larrazabal* debited the defendant with the amount. Soon after, and before the credit had expired, *Larrazabal* and Co. became insolvent; and thereupon the plaintiffs demanded payment of the defendant; which being refused, the present action was brought. Lord *Ellenborough*, C. J. being of opinion upon these facts, that the plaintiffs had dealt with *Larrazabal* and Co. upon their sole and individual credit, knowing that the purchases they made were on account of the defendant, directed a nonsuit. In the following term it was moved to set aside the nonsuit, on the ground of assimilating this case of a dormant principal to that of dormant partner, where, though the party furnishing goods to the ostensible partners intended at the time to give credit only to them, yet he may afterwards pursue his remedy against the dormant partner, when discovered. A rule nisi having been granted,

The Attorney-General, Marryat, and *Littledale,* now shewed [64] cause against it; and observed upon the facts of the case, that the defendant, a foreigner, not wishing to pledge his credit in a *British* market, employed *Larrazabal* and Co. to make purchases for him on their own account, to whom he was to be answerable for the purchases so made. The plaintiffs dealt with *Larrazabal* and Co. as purchasers, and gave them credit for the goods, being aware at the time that they were purchased by *Larrazabal* and Co. on account of the defendant. If the defendant were to be held liable for the goods to these plaintiffs, he will have to pay twice for them; being clearly liable to *Larrazabal* and Co. [Lord

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Ellenborough, C. J. I have had instances perpetually before me, where the foreign trader, not choosing to make himself liable, has gone with his agent to the tradesman, and bought goods in the agent's name. I do not find any case, which decides that where a person sells goods to an agent, with a knowledge of his principal at the time, and gives credit to the agent, he can recover against the principal. *Garrow* for the plaintiffs, observed, that the whole of the argument on behalf of the plaintiffs was, that the defendant was not known to the plaintiffs at the time of the sale to be the principal.] The facts shew the contrary. The defendant, it appears, was present at the time, and pointed out to the plaintiffs the different articles which he required, and selected them from the patterns. The only ground therefore for holding the defendant liable is that the goods ultimately came to his hands. But if this were enough, every foreign colonist who consigns his produce to his correspondent in this country, and receives in return from
[65] the merchant here a cargo purchased in the *British* market, would be liable to the various dealers of whom the articles composing such cargo were purchased. But it has never been attempted to charge the *West India* planter in these cases: the reason of which is that, as between him and the dealers, it is understood that the merchant here purchases on his own account. There is no custom to control that particular branch of trade, except what arises out of the understanding of the parties: where the dealings therefore are similar, the understanding must be the same. Here the defendant stands precisely in the same situation as the *West India* planter. He who employs another to purchase for him may indeed be liable, although the seller gave him no credit, if it shall turn out that he is the actual purchaser; but there is nothing in this transaction or in the nature of *Larrazabal*'s employment to shew that the defendant was the purchaser from the plaintiffs: on the contrary, the engagement between them was made with the express view of exempting him from all such liability; and the plaintiffs by their mode of dealing have shewn that they so understood it, and cannot therefore now resort to him. [Lord *Ellenborough*, C. J. The case in which I remember that the liability of a principal was carried furthest was *Powel* v. *Nelson*, upon the Western circuit, of which Mr. Justice *Lawrence* had a MS. note. There a factor made purchases for his principal, who made payments to him on account. Afterwards the factor was pressed for payment by a letter which came to the hands of the principal who transmitted it to the factor, and with a knowledge of the fact paid him the residue. It was held by Lord *Mansfield* C. J.

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that the principal was liable over to the sellers for the money he had so paid to his factors after notice. *The Attorney-General** said he believed that the case went farther, and that the principal there was held liable to the whole amount of the purchases. *Le Blanc*, J. I should think not: the case can hardly be supported to that extent.] If the seller be at liberty to follow every person into whose hands the goods may have come, it will create endless confusion. A broker may have purchased on account of several principals, and may have received from each of them payments on the general account, or may have made such payments to the seller: in these cases how could the seller apportion such payments, so as to charge each person with his proportional residue; There are many instances where the principal is not liable; as in building contracts; and yet the work done and materials found are for the principal only. [Lord *Ellenborough* mentioned a late case of *Bramah* v. Lord *Abingdon*, where the defendant had contracted with a surveyor, who ordered goods from the plaintiff for the use of the defendant's house; and yet he was held not liable.] In the present case it appears further, that the plaintiff has made his election to charge *Larrazabal* and Co. by delivering the invoices to and debiting them with the price; after which they cannot resort to the defendant. There may be a shifting liability from the broker to the principal, when the latter is disclosed; but if once the election be made, that liability ceases; for the plaintiffs cannot have two concurrent debtors.

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Garrow, *Park*, and *Richardson*, contrà. There is no circumstance in this case to shew that the plaintiffs knew at the time of the sale that the defendant was the principal, except that of his happening to be at the counting-house when the goods were selected. So far from knowing him to be the principal, it does not appear that they knew him even by name. The circumstance of their making out the bills of parcels to *Larrazabal* and Co. carries the case no further; for that was done at a time when they were ignorant of the defendant's liability; which is an answer also to the argument derived from the supposed election of the plaintiffs to resort to *Larrazabal* and Co. only; it being impossible for them to have made any such election until they knew the parties between whom they might elect. It is therefore the common case of a broker who has made purchases for his principal without mentioning his name, in which the principal has always been held liable; as in *Waring* v. *Favenck* (*a*), and *Kymer* v. *Suwer-*

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(*a*) 1 *Campb. N. P. Cas.* 85.

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cropp (*a*). In *Railton* v. *Hodgson* (*b*), *London* sittings after *Trinity* term 1804, and *Peele* v. *Hodgson*, at the sittings after *Michaelmas* term 1804, where the defendant bought goods of the plaintiffs in the name, and upon the credit, of *Smith* and Co.; but those purchases were made in reality on his own account; he was held to be liable. *Mansfield*, C. J. said, Suppose a principal authorizes a factor to sell goods, and he sells them in his own name, the principal may call on the vendee for payment. Suppose the defendant had not been known to be the buyer, he would still have been liable: *Smith* and Co. would only have been nominal buyers. So in *Scrimshire* v. *Alderton* (*c*), even where a factor sold on a del credere commission, the vendee was held liable to the owner of the goods after notice given not to pay the factor. This is not like the case put of a foreign principal residing abroad; for
[68] the defendant was resident here, and establishing a house of trade. Neither can it be compared with that of a person engaging with a surveyor in a building contract; because there the persons employed under the surveyor have notice by the course of the trade that they are dealing with him only. Here if the defendant had wished to exempt himself from the ordinary liability, he should have given notice to the sellers that they were to look to *Larrazabal* and Co. only. No confusion will arise from holding the defendant liable, because the goods here were bought wholly on his account, and not, as in the case supposed, on the account of several principals.

Lord ELLENBOROUGH, C. J. The Court have not the least doubt that if it distinctly appeared that the defendant was the person for whose use and on whose account the goods were bought, and that the plaintiffs knew that fact at the time of the sale, there would not be the least pretence for charging the defendant in this action. But the doubt is whether that does sufficiently appear by the evidence. It appears that the defendant was present at the counting-house of *Larrazabal*, where one of the plaintiffs had come by appointment, and in his presence inspected and selected such of the articles as he required: that the goods were afterwards ordered by *Larrazabal* and Co., credit given to them, and the invoices made out in their name, and sent to them. The question is whether all this was done with a knowledge of the defendant being the principal? The law has been settled by a variety of cases, that an unknown principal, when discovered,

(*a*) 1 *Campb. N. P. Cas.* 109.
(*b*) This case was mentioned on moving for the rule.
(*c*) 2 *Stra.* 1182.

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is liable on the contracts which his agent makes for him: but that must be taken with some qualification, and a party may preclude himself from recovering over * against the principal, by knowingly making the agent his debtor. It certainly appeared to me at the trial that the plaintiffs knew of the defendant being the principal, and had elected to take *Larrazabal* and Co. as their debtors, or I should not have nonsuited the plaintiffs: but as there may perhaps be a doubt upon the evidence, whether the plaintiffs had a perfect knowledge of that fact, it may be as well to have it re-considered.

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GROSE, J. I think that the plaintiffs in this case might have elected whom they would have for their debtor: and here they seem to have made their election. That however is the only doubt which is fit to be considered.

LE BLANC, J. It will be material to have the facts inquired into more fully, in order to ascertain whether the tradesmen sold to the agents with a knowledge of the party for whom they were buying; or whether, without such knowledge, they chose to give credit to the agents, whether buying for another or for themselves. Many of these cases may perhaps be found distinguishable from this by their not falling precisely within the doctrine applicable to principal and broker: and it may be necessary to consider in the present case, whether any distinction can be made between a home and a foreign principal.

BAYLEY, J. There may be a particular course of dealing with respect to trade in favour of a foreign principal, that he shall not be liable in cases where a home principal would be liable: that would be a question for the jury. I have generally understood that the seller may look to the principal when he discovers him unless he has abandoned his right to resort to him. I agree that where the seller knows the principal at the time, and yet elects to give credit to the agent, he must be taken to have abandoned such right, and cannot therefore afterwards charge the principal. I think it should be re-considered in this case whether the plaintiffs did so.

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Rule absolute.

OSWELL and Another *against* VIGNE.

Friday. Jan. 31st.

An assured upon a policy on ship, not having leave to carry simulated papers, cannot recover for a loss by capture, if it appear by the sentence of the foreign prize court that one of the causes stated for the condemnation was the carrying of simulated papers.

THIS was an action on a policy of assurance on the ship *Wasila,* at and from *London* to any port or ports in the *Baltic.* *The policy did not contain any leave to carry simulated papers.* The

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interest was averred in one *Yakof Fomin*, and a total loss alleged by attack and seizure of the enemy. At the trial before Lord *Ellenborough*, C. J. at the *London* sittings after *Trinity* term, it appeared that *Fomin* was a *Russian* subject; that the ship sailed with a licence on the voyage insured from *London* to *Petersburgh*; and after touching at *Gottenburg* was captured by a *Danish* privateer, carried into *Arlborg*, and condemned as prize to the captors; which sentence of condemnation was afterwards, on appeal, confirmed by the Court of admiralty at *Copenhagen*. Extracts of the sentences of condemnation and confirmation were put in, and were as follows. 21st *June* 1810: Sentence of condemnation pronounced in the case No. 7. the privateer *Jorgen Neilson*, plaintiff, and Cap. *Geo. Weyer* ship *Wassila*, defendant. Under the present case it has been confessed by the captain and crew of the brig *Wassila*, brought to *Arlborg* by the privateer *Jorgen Neilson*, that the ship coming from
[71] *London* has made use of an *English* convoy thence to *Gottenburg*, and formerly from *Cronstadt* through the *Belt*. *By reason thereof, and as the ship's papers are besides not in due order*, there cannot, without any further examination, be the least doubt but that the ship, together with that part of the cargo she had in at the capture, must be adjudged to the privateer who has made the prize at a lawful place, and has been supplied with a letter of marque. Sentence of confirmation, 2d *December* 1810. Though the nationality of the ship *Wassila* as *Russian*, were perfectly cleared up, still it has been evidently proved, that it has been forfeited by the conduct of the plaintiff (the agent of *Fomin* at *Copenhagen*) and the captain on this voyage. It has been confessed by Capt. *Geo. Weyer* and his whole crew, and the plaintiff himself has acknowledged, that the vessel went last year through the *Belt* under *English* convoy with a cargo bound to *London*, which was also unloaded there. Afterwards the vessel went from *London* to *Gottenburg* under convoy, and was to follow the same for the future; but she did not get ready soon enough. *That the captain on the voyage has used a simulated clearance, has had false papers, and has kept a false journal.* These are the usual means whereby to conceal a smuggling trade with the enemy. Thus it is plain that this vessel is, according to the regulation for captors, liable to condemnation. And it concluded by decreeing that the sentence of the prize court should remain in force.

Under these circumstances it was contended at the trial, on behalf of the defendant, that the carrying simulated papers, not being within the terms of the policy, and being the ground of the condemnation of the ship, the plaintiffs were not entitled to recover for

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a loss of which they were the efficient cause. But a verdict * was taken for the plaintiffs, with liberty to the defendant to move to enter a nonsuit; which rule was accordingly obtained in the last term, when a case of *Steele* v. *Lacy* was cited, where the plaintiff having obtained a verdict at the sittings in *London* in C. B. under similar circumstances, the Court of C. B. afterwards granted a new trial. [*72]

The Attorney-General, Park, and *Gaselee,* now shewed cause. 1st, Admitting that the sentence has proceeded on the ground of the ship having carried simulated papers, there is nothing illegal in carrying such papers: and though it may not be included within the precise terms, it is nevertheless within the general scope of the adventure insured. This was an insurance from *London* to any ports in the *Baltic,* and the ship's destination was to *Petersburgh;* which is within the policy. It was well known to all parties that the circumstance of her having touched in *England* was a cause of condemnation in the enemy's ports. But as every ship must carry some clearance, and the want of one would in itself have been a ground of condemnation; so a true clearance in the present case would have equally subjected her to condemnation, because it would have shewn she came from *England.* By carrying simulated papers, therefore, the assured have done every thing in their power to protect the underwriters from the chance of a loss; who, if they had not so done, might more reasonably have objected that the assured had risked the safety of the ship by neglecting that which is now a common precaution. It would be unjust to hold that the carrying of simulated papers for the purpose of concealing a fact, which if known must necessarily have induced a condemnation, avoids the policy. The only object in carrying them was [72] the protection of the ship. [Lord *Ellenborough,* C. J. Is it contended that the assured are authorized to do any act intended for the bonâ fide protection of the ship? Would then the assured have been at liberty to resist a right of search on account of her having these papers on board?] Supposing that search would necessarily have led to her condemnation, the underwriters could not have objected to the assured's making such resistance. [Lord *Ellenborough,* C. J. Is not then the risk thereby altered; and should not the assured have authorized themselves, by leave of the underwriter, to take such precarious muniments on board?] They were not precarious, because without them the ship could not avoid condemnation. This is like the case of a ship carrying false colours to deceive an enemy in sight: if a condemnation ensued on that account, would it preclude the assured from recovering? [*Bayley,* J.

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Carrying false colours could not be a ground of condemnation. Lord *Ellenborough*, C. J. Carrying a variety of colours has never been considered as a contravention of the law of nations.] False colours are more calculated to deceive than false papers; for they tend to elude pursuit and search. This is not like the case of *Steele* v. *Lacey* (*a*), which left untouched the question as to simulated papers. There the ship had been condemned for not producing a passport when demanded. *Denison* v. *Modigliani* (*b*) has been overruled by *Moss* v. *Byrom* (*c*); in which latter case it was held that the taking letters of marque without leave of the underwriter did not vary the risk, so as to avoid the policy. But 2dly, They argued that it did not necessarily appear on the face of these sen-
[74] tences that the ship was condemned for carrying simulated papers; that other causes were mentioned; as the confession of the captain, that the vessel went last year through the *Belt* under *English* convoy with a cargo bound to *London*, which was also unloaded there; and that afterwards the vessel went from *London* to *Gottenburg* under convoy. The sentence therefore first states a smuggling trade with the enemy, and then adds that the ship had simulated papers; and concludes, that those were the means whereby to conceal a smuggling trade with the enemy. It should seem therefore that the ground of condemnation was that the ship carried on a smuggling trade with the enemy; and the other parts of the sentence are only the evidence whereby the Court arrived at that conclusion. The words in the first sentence, "by reason thereof," cannot refer to simulated papers; there being no mention made of them in the preceding part: they must be taken to refer only to that which is stated before, viz. that the ship coming from *London* had made use of an *English* convoy, &c. [Lord *Ellenborough*, C. J. The words are, "by reason thereof, and as the ship's papers are not in due order:" it is a condemnation therefore for these conjunct causes.] It is incumbent on the underwriter to shew affirmatively that the carrying simulated papers was a cause of condemnation: the assured is not bound to negative the possibility of its being so; and it is sufficient for him if it only remain doubtful.

Garrow, *Topping*, and *Richardson*, contrà. Coupling the two sentences together there can be no doubt that the carrying simulated papers was the ground of condemnation; or, if the sentences
[75] did not proceed wholly on this ground, that it was at least one of the operative causes: and in either view, if the plaintiffs were not

(*a*) Cited in *Bell* v. *Castairs*, 14 *East*. 387.
(*b*) 5 *Term Rep*. 580. (*c*) 6 *Term Rep*. 379.

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at liberty to carry simulated papers, they will be precluded from recovering in this action : because a party cannot avail himself of a loss of which he has been, in whole or in part, the efficient cause. The only remaining question therefore is whether the assured were at liberty to carry simulated papers without the permission of the underwriter ? But that has been already decided in the negative in *Horner* v. *Lushington* (*a*) ; where the verdict having been found against the assured on this very point, the Court refused to grant a rule nisi for a new trial. There is no inconvenience in that doctrine ; for it is easy to give notice to the underwriter, where the party means to carry simulated papers, and to obtain his leave for that purpose ; and it is right that such notice should be given, because in some respects the risk may be varied by carrying them. In *Moss* v. *Byrom* the letters of marque were taken without any intention of using them.

Lord ELLENBOROUGH, C. J. It has been determined by the decisions of the courts of admiralty, that the carrying simulated papers is an efficient cause of condemnation. This ship had simulated papers on board. The question then is if the carrying them were one of the causes of her condemnation : if it were, it was a risk to which the underwriter has been exposed without his consent. In *Denison* v. *Modigliani* the taking the letters of marque only indicated an intention to use them, which if the assured had afterwards done, that might have been a deviation, and discharged the underwriter ; inasmuch as the party was not warranted to enter into a hostile speculation, under an insurance intended to protect a mercantile adventure. But that intention was not carried into effect ; and therefore the principles on which that case was decided were in the subsequent case of *Moss* v. *Byrom* considered as new, and going to the extreme verge, and it has not since been acted upon. The question however here is whether the simulated papers were not a co-efficient cause of condemnation ? In order to ascertain that, we must look to the sentence. It commences, " Though the nationality of the ship *Wassila* as *Russian* were perfectly cleared up, still it has been evidently proved that it has been forfeited by the conduct of the captain on this voyage. It has been confessed by the captain and his whole crew that the vessel went last year through the *Belt* under *English* convoy with a cargo bound to *London*, which was also unloaded there : afterwards the vessel went from *London* to *Gottenburg* under convoy, and was to follow the same for the future, but did not get ready soon enough." It then seems to take up a new stage of proceeding applicable to this voy

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(*a*) *Ante*, 46.

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age. "The captain on the voyage has used a simulated clearance, has had false papers, and kept a false journal. These are the usual means whereby to conceal a smuggling trade with the enemy. *Thus* it is plain that this vessel is, according to the regulations for captors, liable to condemnation." Why does the sentence use the term "thus," except as referring to what has been before stated, viz. the having a simulated clearance and false papers? Can any one doubt, after reading the sentence, that this is at least one of the efficient causes of condemnation? I cannot say that it did not make a main ingredient in the cause of condemnation; and if so, it has induced a forfeiture brought on by the act of the assured themselves. As long as the comity of nations is allowed to stand, and to regard these condemnations as final, and not as res inter alios acta; it seems to me that looking at this sentence as our guide, we must consider the carrying simulated papers as one of the grounds of forfeiture.

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GROSE, J. Though this is an ungracious defence, yet looking to the sentence, I cannot but say that the carrying simulated papers is a ground of the condemnation; and being so, that the plaintiffs cannot recover upon this policy in consequence of the loss from that cause.

LE BLANC, J. The defendants contend that they are to be relieved from this loss, because it was induced by the act of the plaintiffs: and they are bound to make out that point. I take it to have been decided in many cases in the court of admiralty, that having simulated papers is a ground of condemnation. The question then is, was this a ground, or one of the grounds of condemnation? I think that looking at the sentence, it must be taken to be one of those grounds, independently of which we cannot say the ship would have been condemned.

BAYLEY, J. concurred.

Rule absolute.

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Saturday, Feb. 1st.

DANIEL *against* THOMPSON.

The Court, on application by the bail of the defendant, who was in custody on a charge of obtaining money upon false pretences, will grant a writ of habeas corpus to the gaoler to bring him up, in order that he may be rendered in discharge of his bail.

COMYN moved for a writ of habeas corpus directed to the keeper of the New Prison, *Clerkenwell*, to bring up the defendant, for the purpose of rendering him in discharge of his bail. The affidavit on which he moved stated that the defendant was arrested

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at the suit of the plaintiff on the 9th of *January* last, and that the deponent became bail to the sheriff: after which, and before the return of the writ, the defendant was taken into custody upon a charge of obtaining money under false pretences: and that the plaintiff was proceeding against the sheriff, in order to fix the bail. He mentioned the case of *Sharp* v. *Sheriff* (*a*), where an application of this nature was granted in the case of one in custody on a charge of felony. Whereupon *Bayley*, J. (the only Judge in court) granted the writ.

(*a*) 7 *Term Rep.* 226.

CLUTTERBUCK *against* JONES.

Monday, Feb. 3d.

GURNEY on a former day obtained a rule upon the plaintiff, to shew cause why the writ of distringas issued in this cause, addressed to the present sheriffs of *London*, directing them to distrain the late sheriffs of *London* for not selling the goods of the defendant by them taken in execution, should not be quashed. The affidavit, on which this rule was moved, stated that on the 4th of *February* 1811, a writ of fi. fa. issued in the above cause to the late sheriffs, which was delivered to them on the 5th, who on the same day took the defendant's goods. That on the 8th of *February* the sheriffs were ruled to return the writ; and in pursuance thereof returned that they had goods of the defendant in hand for want of buyers, the value of which was unknown to them: which writ and return were filed on the 11th of *February*. That no writ of venditioni exponas had issued on that return. That on the 21st of *February* a commission of bankrupt was awarded against the defendant, on which he was declared bankrupt, upon an act of bankruptcy committed on the 7th of *December* preceding. That in *March* 1811, the assignees under that commission applied to the sheriffs for the delivery of the goods; which they accordingly delivered to them on the 16th of that month. That the late sheriffs quitted their office on the 28th of *September* following, and no further proceedings were had until the 3d of *January* 1812, when the above writ of distringas was delivered to the present sheriffs.

Park now shewed cause upon an affidavit of the plaintiff, wherein he swore that he believed the commission above mentioned to

Where the late sheriffs of *London*, having [79] taken the defendant's goods in execution under a writ of fi. fa. were ruled, on the 8th of *February* 1811, to return the writ; and returned on the 11th that they had the goods in hand for want of buyers; after which the plaintiff, without issuing a writ of venditioni exponas, lay by till after a commission of bankrupt against the defendant, founded on an act of bankruptcy prior to the execution, and till after the then sheriffs had delivered the goods up to the assignees of the bankrupt on the 16th of *March*, and had gone out of office in the *September* following; and then, in *January* 1812, issued a writ of distringas to the present sheriffs to distrain the late sheriffs for not selling the goods; the Court set aside the last-mentioned writ; leaving the plaintiff to his remedy by action, if the commission were fraudulent, as alleged by him.

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CLUTTERBUCK *against* JONES.

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be fraudulent, and sued out with a view of avoiding the proceedings taken by him. That on the 29th of the said *February* he caused notice to be given to the said sheriffs, that as the proceedings under the commission of bankrupt were intended to be disputed, they were required not to quit possession of the goods levied under the said execution. That the said sheriffs kept possession until the 16th of *March*, and charged the plaintiff for so doing, when they delivered the goods to the assignees on being indemnified. He thereupon contended that the sheriffs were not justified in delivering over the goods to the assignees, after having returned that the goods were in their hands: and relied on the words of *Powell*, J. in *Clerk* v. *Withers* (*a*): "It is clear by the year-book of *H.* 6. that if a sheriff return that he has goods in his hands for want of buyers, and be afterwards amoved, a distringas shall go to the new sheriff to distrain the old sheriff to sell the goods and give him the money to bring it into court." [*Bayley*, J. You would distrain the late sheriffs for not having sold; but they have not been ordered so to do.] They have put it out of their own power by parting with the goods. [Lord *Ellenborough*, C. J. Should you not have issued a venditioni exponas, that the sheriffs might return the facts?] We cannot have that writ, because the sheriffs are out of office. They have delivered over the goods without any consultation with the plaintiff, though they have charged him for the custody of them. [Lord *Ellenborough*, C. J. In *Clerk* v. *Withers* the sheriff still retained the goods: whereas here we are asked, by means of this distringas, to compel them to do that which appears by the affidavits to be impossible, viz. to sell the goods which they have parted with. Should you not bring your action against them for parting with the goods after having made their return?]

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Gurney, in support of the rule, said that the sheriffs had remained in office upwards of seven months after the return made, during which time the plaintiff chose to lie by, instead of proceeding to compel a sale; so that there was laches on his part.

Lord ELLENBOROUGH, C. J. The distringas must be set aside, and the plaintiff left to bring his action.

Per Curiam, Rule absolute.

(*a*) 6 *Mod.* 293.

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BLACKBURNE *against* THOMPSON.

Tuesday, Feb. 4th.

THIS was an action on a policy of insurance, effected on the 21st of *December* 1807, on the ship *Elizabeth and Mary*, and her cargo, (the goods being valued) at and from *London*, until the ship's arrival at her last port or place of discharge in *Hayti:* and the plaintiff declared as upon a loss by seizure and detention of persons unknown on the high seas. The facts which appeared at the trial before Lord *Ellenborough*, C. J. at *Guildhall*, were that this, which was a *British* ship, having a cargo of goods shipped in *October* 1807, sailed in *December* to the island of *St. Domingo* (called *Hayti* in the policy), from the port of *London*, and carried a licence from the king in council, authorizing the plaintiff and other *British* merchants " to export from the port of *London* to any port or place in the island of *St. Domingo* or *Hayti*, as are not or shall not be under the immediate dominion, and in the actual possession, of any of the king's enemies, *British manufactures and East India goods*; and to import a return-cargo of articles of the growth and produce of the said island (except copper:") and the licence, which was addressed to all commanders of the king's ships and of privateers and others, directed that the ship and cargo should not be liable to condemnation as prize in any of the king's courts of admiralty or vice-admiralty, either on account of the existing war, or any other hostilities which might in the mean time take place. With a proviso that the licence should not be considered to protect any other property laden on board the said ship which might be otherwise liable to confiscation as prize, except the property of the plaintiff and other *British* merchants, being of the description therein before specified. And providing further, that if the said property should be seized or detained, either in the outward or homeward bound voyage, by any ships of war or privateers, and *be brought to adjudication* in any of the admiralty or vice-admiralty courts, *the said property should be forthwith released, upon a claim being exhibited, and sufficient bail being given to answer the adjudication thereof*, &c. This licence was to remain in force for 18 months from the date, which was the 14th of *October* 1807. The outward cargo consisted principally

The king having, by orders in council, declared certain ports in *St. Domingo not hostile*, which had formerly been, but were no longer in the possession nor under the dominion of *France;* though such declarations were made

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for collateral and limited purposes, not covering in their terms the trading in question, yet a trading to such ports from parts of the king's dominions, not named in such prior limited orders, was held to be legalized, the same as to neutral ports in general, by such authoritative recognition of those ports in *St. Domingo* not being *hostile:* and the inference as to the legality of such neutral trade is not rebutted by a subsequent order of council opening the trade generally (so as to cover in its terms the particular adventure) to all ports of *St. Domingo* not in the

possession of *France*. And such trade to neutral ports, requiring no licence from the crown, is not restricted by the fact of a *British* ship carrying a licence for trading to them from *Great Britain* with a certain specified cargo; but the *British* trader may, notwithstanding, carry other lawful goods, and insure his whole adventure, and may recover from the underwriter a loss arising from captnre by a *British* cruizer, though induced by the fact of such trading with goods not covered by the licence which was produced to the captor: for the licence itself not being necessary, the carrying of goods not included in it was no legal cause of seizure, however it might operate upon the question of costs in the prize court.

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BLACKBURNE *against* THOMPSON.

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of goods of the description mentioned in the licence: but in addition to these the plaintiff put on board a quantity of *claret*, *Dutch* cheese, and *Madeira* wine; and with this cargo she arrived at *Cape François*, a port of *St. Domingo;* where she disposed of about a fifth of her cargo, and contracted for the remainder with an agent of *Christophe*, the ruler of that port of the island, which was not to be delivered at *St. Marc's*, another port of the island under his rule: for which the ship accordingly sailed; but before she reached her destination, she was seized as prize by a *British* ship of war, in consequence of having on board the claret, which was included in the licence, and was carried into *Jamaica*, and the cargo condemned in the vice-admiralty court there, on the ground of its being enemy's property, in consequence of the contract of sale to *Christophe:* against which there was an appeal to the king in council, by which court the sentence of condemnation was reversed, and the cargo ordered to be restored to the claimants, on payment of the captors' expences in both courts.

Certain orders of council were referred to at the trial on the part of the assured, of a date prior to this transaction, recognizing, as it was said, the national character of that part of *St. Domingo* to which this adventure extended, as no longer hostile to our government, and therefore legalizing the adventure independently of the licence. On the other hand, those orders were contended to be of a partial and limited nature, not embracing the trading in question, and that such trading was illegal until warranted by some authoritative act of recognition by the *British* government, which it was said had no existence till after the transaction in question. And further, that whether a licence was necessary or not for the particular adventure; yet as the assured had thought proper to obtain one, he was bound by the terms of it; and his departure from it by taking on board goods of a description not covered by the licence, being the efficient cause of the seizure and detention, the loss was to be attributed to his own act, and therefore he could not recover the average loss sought to be obtained by this action. Lord *Ellenborough*, C. J. however overruled the defendant's objections, and the plaintiff recovered a verdict for the amount of the loss proved.

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Carr in *Michaelmas* term last moved to set aside the verdict and enter a nonsuit, or for a new trial, upon two grounds: 1st, that without the licence, the voyage would have been illegal; 2dly, That the assured himself was the efficient cause of the loss by taking on board that part of the cargo, which, whether lawful or not, had at all events subjected the ship to a *rightful detention*, (as

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not being included in the licence which she carried;) which appeared by the court of appeal having only directed restitution on the terms of paying all the captor's expences. Upon the first point, the argument was shortly this: *St. Domingo* was at one time a colony of *France*, the enemy of *Great Britain*; and it was for the crown to judge at what period, if at all, during its internal revolution, it ceased to be hostile. The first order of council, allowing of any trade to the subjects of this country with *St. Domingo*, was one of the 19th of *November* 1806 (*a*), giving free liberty of commerce to *St. Domingo*, subject to certain restrictions, *from the Bahama and Leeward islands.* The next was an order of the 11th of *February* 1807 (*b*), which was also of a limited nature, not covering in its terms this adventure. It enabled all *British* vessels cleared out from any of the ports of the United Kingdom to *Buenos Ayres* and the river *Plata* to proceed to any [85] port of the island of *St. Domingo, not in the immediate possession and under the control of* France, or *of Spain*, and there to dispose of their cargoes, and to load produce in return. The next was an order of the 15th of *July* 1807, like the first, but limited to a trading with *Nova Scotia* (*c*). And lastly an order of the 14th of *December* 1808, which was subsequent to the adventure, and therefore could not legalize it, which opened to the *British* trade in general all the ports of *St. Domingo* not in the possession of *France*, in like manner as to any neutral country. And he contended that the court of appeal had erroneously reversed the sentence of condemnation of the prize court: and that the underwriter was not concluded by the sentence of restitution from shewing the illegality of the voyage.

The Attorney-General, Garrow, Park and *Campbell*, now shewed cause against the rule, and contended that the trade to *St. Domingo*, as to a neutral country, was legal, independently of the licence; for that the neutrality of that country with respect to trade had been impliedly recognized by the acts of the *British* government prior to and at the time of the adventure in question; although they admitted that the adventure was not covered by the express terms of any of the prior orders in council which had been referred to. This neutral character of such of the ports of *St. Domingo* as were not under the dominion of *France*, they said, was recognized in the case of the *Manilla* (*d*), an *American* ship trading from *Port-au-Prince* in *St. Domingo* to *Gottenburg*; where the question arose upon the construction of the 4th clause of an order in [86]

(*a*) This is to be found in the appendix to the 1st vol. of *Edward's Adm. Rep.* A.
(*b*) *Ib.* B. (*c*) *Ib.* C. (*d*) *Ib.*

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council of the 11th of *November* 1807, which was issued, not indeed for the avowed purpose of regulating the trade to *St. Domingo* which is not mentioned in it, but for a collateral purpose. That decision took place in 1808, when Sir *Wm. Scott* decreed that the ship, which had been captured, as being engaged in a trade from the enemy's colony to a neutral port in contravention of the general order in council, should be restored, upon the ground that the *British* government had by their prior orders and instructions recognized the neutrality of those parts of *St. Domingo* which were not under the dominion or in the actual possession of the enemy; which was notoriously the case of *Port-au-Prince* at that time: and he relied on the order of the 11th of *February* 1807, amongst others, as recognizing such neutral character. This was also recognized by the Master of the Rolls in the case of the *Pelican*, upon appeal, at the *Cockpit*, in *May* 1809 (*a*), in which his Honor said that "it was sufficient to raise the question that the orders in council negatived a hostile character applying to certain ports of the colony:" from one of which the vessel in question had sailed. They also referred to *Johnson* v. *Greaves* (*b*), in which the court of C. P. drew the same inference, as to the neutrality of *St. Domingo*, and held that a licence was not necessary to legalize a trade with the insurgent power there. They concluded that this Court would not decide that the port of *Cape François* in *St. Domingo*, to which this ship had traded, was *hostile*, under circumstances in which the king, who has conclusively the power of declaring whether a port is hostile or not, had by his orders in council
[87] declared that it was not hostile; and still less after the judgment of the privy council upon this very adventure, reversing the sentence of condemnation pronounced by the prize court in *Jamaica*, and thereby declaring that the adventure was not illegal: though they did not press this sentence as conclusive upon the question between the parties in this case, as a judgment of condemnation would have been. On the other point, it was shortly answered that the carrying an unnecessary licence could not affect the plaintiff's right to recover a loss incurred upon a legal adventure.

Topping and *Carr*, in support of the rule; as to the necessity of a licence; after arguing upon the words of the several previous orders in council, to shew that they did not cover this adventure, said, with deference to the opinions referred to, that it seemed a forced conclusion to draw from the terms of those limited orders, successively permitting certain restricted tradings only with *St.*

(*a*) 1 *Edw. Adm. Rep. Appx.* D. (*b*) 2 *Taunt.* 344.

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Domingo, that a general right of trading was recognized; and relied on the last order, that of the 14th of *December* 1808, issued subsequently to this adventure, and legalizing prospectively only the general trade, as shewing that the crown had not intended to permit it before: guarded too, as it was, with a proviso, that it should not affect any question then depending in the courts respecting the national character of the ports in *St. Domingo*. They observed also, that the cases before the court of admiralty and the privy council were cases of *neutral* and not of *British* ships trading to *St. Domingo*, and therefore plainly distinguishable: though they admitted that the same answer did not apply to the case of *Johnson* v. *Greaves* in C. P. in which the adventure was *British*: but that case turned principally upon the construction of the charterparty, [88] and the general question was only slightly adverted to in the argument. Previous to the general order of the 14th of *December* 1808, the national character of *St. Domingo* must be considered to have been at least doubtful. Originally all its ports were decidedly hostile, but varying circumstances in the chances of war between the three conflicting parties which then divided the island, namely, the blacks, the mulattoes, and the *French*, rendered it for a long time doubtful what the national character of the several ports might be. It was for the crown exclusively to fix the character of each by its public declarations: and as, with respect to its own subjects, it might exclude them from all intercourse, so it might open that intercourse to them gradually; and it was not lawful for any subject to anticipate the declaration of the crown before it was actually promulgated; and this was never done till subsequent to the period of this adventure. The argument on the other side assumes that the subject has a right to determine the proper period for opening the trade, if in fact there existed no actual hostility at the time. But while the matter remains in doubt, that would be assuming the prerogative; and is very different from the principle of the former decisions by Sir *William Scott* and the Master of the Rolls, mitigating the rigour of the orders of council with respect to neutrals, who were not bound to attend to any other than the broad line of distinction between hostile and not hostile. [Lord *Ellenborough*, C. J. Is not this a question of municipal law? And if it can be proved that a place once hostile has ceased to be so by a change of circumstances in the country, is there any authority to shew that it is illegal afterwards in a subject of this country to trade there? Suppose the crown had simply promulgated by an order in council that [89] certain parts of *Hayti* were not in possession of the enemy,

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would that not have legalized a trade to that place the same as to any other neutral territory? The king's declaration to that effect is not less conclusive on the common law courts of the realm than on the prize courts.] The sovereign ought first to declare when such general commercial communication may with safety and advantage to the state take place; and it would be attended with great public mischief to permit the subject to assume the fact on his individual responsibility. [Lord *Ellenborough*, C. J. Suppose an order in council had declared a certain commerce unlawful, would that of itself illegalize a prior trading there by a subject? Or suppose no order of council upon the matter, but that a place formerly under the dominion of the enemy had been taken possession of by the king's troops, would the sending of provisions there upon receipt of the intelligence be illegal, without a proclamation to make it lawful? I state these suppositions, in order to try the necessity of such an order in this case.] The existence of an order regulating the intercourse with foreign countries makes a material difference in the consideration of such questions. Sir *Wm. Scott* and the Master of the Rolls agree that it is for the crown to declare the national character of places so circumstanced. Secondly, this action is also defensible on the other point mentioned, namely, that the assured has been the cause of his own loss. For supposing a licence not to have been necessary, yet as he thought proper to take one, and afterwards acted in contravention of it, by taking on board *French* wines, and the capture ensued on that very account, the loss thereby sustained was owing to his own fault. The licence also says that in case of seizure, the vessel [90] shall be released on giving bail: the assured ought then to have given bail, which would have prevented or greatly reduced the loss. [*Bayley*, J. How does it appear that he could get bail?] He should have shewn that he could not. [*Bayley, J.* That was a question of damages on which the defendant should have gone to the jury, if he meant to lay any stress on it.]

Lord ELLENBOROUGH, C. J. If the rest of the Court agree with me in thinking that the licence was wholly unnecessary, and that the assured might renounce it, he was not fettered by the terms of it, and the question last made will not arise. The other is a grave question, whether the voyage insured was protected by law without the licence; and that depends in a great measure upon the consideration of the orders in council, which have been referred to. I agree with the Master of the Rolls, in the case of the *Pelican*, that it belongs to the government of the country to determine in what relation of peace or war any other country

stands towards it; and that it would be unsafe for courts of justice to take upon them without that authority to decide upon those relations. But when the crown has decided upon the relation of peace or war in which another country stands to this, there is an end of the question; and in the absence of any express promulgation of the will of the sovereign in that respect, it may be collected from other acts of the state. If the enemy were evicted by the king's troops from any place before held by them, it cannot be doubted that, without any formal proclamation for that purpose, it would be lawful for the subject to carry on trade with that place in order to sustain the king's troops, and to maintain his possession; and it would be no violation of his duty as a subject [91] also to trade with his fellow subjects there for their support, and that of the *British* authority. It behoves the subject indeed to act with more caution in entering upon any new intercourse of this sort, when he has not the express authority of his sovereign to guide him, and to take care in so doing that he does not invade his duty of allegiance; but if the fact will bear him out, I see no reason why he may not trade to any neutral or friendly country without any express promulgation of the sovereign's will in that respect. And when the crown has considered a foreign country as ceasing to be hostile, and under the dominion of *France*, the subject may also consider it open to lawful commercial adventure as any other neutral state. The question therefore comes to this: has the crown authoritatively pronounced upon the relation of this country to that part of *St. Domingo* to which the trade insured was carried on? It had issued various orders in council, the general bearing of which upon this question has been considered by *Sir William Scott*, in the case of the *Manilla*, and by the Master of the Rolls in the case of the *Pelican:* and without referring to the particular facts in those cases, the Master of the Rolls in the latter of them lays down the rule generally, that it belongs to the government of the country to determine in what relation any other country stands towards it, and that the courts of justice cannot decide upon that point: by which I must understand him to have said that they cannot decide adversely to the declaration of the sovereign upon the point. He goes on to state that the orders of council, which had been promulgated previously to the capture in that case, contained a recognition on the part of his Majesty's government, that there were ports and places in *St. Domingo* not [92] in the possession nor under the dominion of the enemy: and in conclusion he says, that the orders negatived a *hostile* character in those ports and places of the island. The only question then

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being, whether the crown has in those orders negatived the hostile character of certain ports of *St. Domingo*, to which this adventure was confined; those learned judges have pronounced that it has so done. But it is said that those orders were made alio intuitu, not to legalize the trade in general to *St. Domingo*, but only for special purposes connected with the navigation laws, and in a limited manner. If the crown however for any purpose, be the purpose what it may, recognize the fact that those ports are no longer hostile, it is still a declaration by the crown that they do not stand in a hostile relation to this country; and if so, it follows that the subject might carry on trade with such places in the same manner as with other neutral countries under similar circumstances. A further argument has also been derived from the subsequent order of the 14th of *December* 1808, legalizing the trade generally, as furnishing an inference that it was not considered by the crown as generally legal before. But the question must be considered the same as it stood before the promulgation of that order, when the subject had no other guide than the previous orders which had been issued. For after the crown had in those orders recognized that certain ports of *St. Domingo* were not hostile, it could not in honour have retracted its declaration at that period, nor would any subsequent retractation have involved the subject in the consequence of an illegal act, who had acted at the time upon the faith of its prior declaration: this however is an extreme case,
[93] which cannot be supposed to happen. There is no doubt great convenience in the crown making such a general declaration as is contained in the subsequent order of council, since it saves much difficulty in ascertaining the character of such foreign places, as have been rescued from the enemy, or have fallen under their dominion; for want of which at one period different verdicts were given in different causes, in respect to commercial adventures of the same description to *Hamburgh*. But Courts and juries cannot do otherwise than decide secundum allegata et probata in each particular case, without regard to other proof in other causes. In this case the plaintiff is entitled to recover, having prosecuted the trade insured with places, which by prior orders of council in 1807 were declared to have ceased to be under the dominion of the enemy, and were thereby recognized as neutral. Then by the mere operation of law those places were open to trade as other places not hostile are; and the subsequent order of the 14th of *December* 1808 only confirmed more generally the legality of such trading.

GROSE, J. The law has been well laid down in the cases be-

fore Sir *William Scott* and Sir *William Grant;* and after those decisions, the grounds of which have been now stated, there is no doubt of the application of the principle which governed them to the present case.

LE BLANC, J. The motion for entering a nonsuit in this case was grounded on the supposition that the voyage insured was at that time an illegal adventure. The policy is in general terms on goods at and from *London*, until the ship's arrival at her last port or place of discharge in *Hayti;* and the fact was that the ship had [94] touched and traded at *Cape Frañçois*, a port of that island under the dominion of *Christophe*, and was proceeding to another port of the island called *St. Marc*'s, held by the same chief, when she was captured by a *British* crüizer. But she had neither proceeded nor was proceeding to any port then under the dominion of *France*, to which the whole colony had formerly belonged. The question now is whether before this adventure it had been authoritatively declared by the government of this country that those ports were not hostile? No other evidence of this appeared at the trial but the prior orders of council; and the principal question is whether they contain any declaration of the government that there were ports of *St. Domingo* not hostile: and another question has been made whether the assured has done any act to occasion the loss in this case? It is said that the having claret on board, which was not included in the licence which the ship carried, was the occasion of the seizure and subsequent loss: but the fact of having claret on board, if there had been no licence, was no cause of seizure; and then the question is whether the assured having obtained a licence for the voyage, not authorizing claret as part of the cargo, was a just cause of seizure? But if no licence were necessary, it was immaterial what the licence contained, and the cargo was seized for that which was no just cause of seizure; and therefore the assured would not have done any thing to cause the seizure and loss. That brings it to the question whether it was necessary to have a licence for this trading adventure; and that depends on another question, whether the voyage was to a *hostile* port: for if not, no licence was necessary. But the prior orders of council had declared that there [95] were certain ports of *St. Domingo* not in the possession nor under the dominion of *France;* which was the fact as to the ports in question; they had therefore declared that those ports were not hostile: and if not hostile, then it followed that the subject might freely trade to them as to any other neutral port. Then it was objected that those prior orders were of a limited kind, and that this adventure was not covered by the terms of any of them. But

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if the places themselves were declared not to be hostile, though such declaration were made for another purpose than the trade in question, still it was an authoritative declaration of the fact that they were not hostile. Then the subsequent order of the 14th of *December* 1808 was relied on to shew that till that period the crown did not consider that the trade in general was opened. But if this trade were not illegal before, that order could not make it antecedently illegal, though it contained a general authoritative declaration that those ports were not hostile. For if the crown had before declared, though for particular purposes, that they were not hostile, that made the trading to them legal; and it was not inconsistent with those prior declarations, that the crown should afterwards, to clear all doubts upon the subject, make the general declaration. What state then can be predicated of a port, which is not hostile, to which the subject may not trade, if such trade be not by law specially prohibited? I consider the last order in council as meant to remove all doubt; and it seems to guard against the inference now endeavoured to be drawn from it, by providing that the general declaration contained in it should not [96] prejudice any questions then pending in judgment. Our opinion is also fortified by that of the Court of Common Pleas, who upon a similar case before them, held the voyage to be legal.

BAYLEY, J. I agree with the rest of the Court upon this case, which has been so fully entered upon by my Lord and my Brother *Le Blanc*, that it is not necessary for me to go at large into the subject. I cannot say that this ship was trading to hostile ports; and if not, no licence was necessary to cover the trading. The cases decided by Sir *William Scott* and the Master of the Rolls shew that the ports in question were not hostile; for if they had been so, the ships in those cases would have been liable to seizure and confiscation; but they were decreed to be liberated. That decides the present case. Those cases however were attempted to be distinguished from this, as affecting only neutral traders: but no such distinction between *British* and neutral ships was taken in the subsequent case before the Court of *C. P.* which expressly governs this: and both the Chief Justice and Mr. Justice *Lawrence* say that if the vessel were not sailing to a hostile port, no licence was necessary.

Rule discharged.

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DAVIS *against* VASS.

Tuesday, Feb. 4th.

Where an award appears to have been made out of the time originally given to the arbitrator by the rule of Court, but which rule reserved to him the power of enlarging the time; it is not enough for obtaining an attachment for non-performance of the award, that the arbitrator states in his award that he had enlarged the time, without verifying the fact by affidavit, and it should also appear that the defendant had notice of such enlargement of the time within which the award was made when served with the [98] rule for the attachment.

UPON a rule for an attachment against the defendant for non-performance of an award, it appeared on the plaintiff's affidavits, that the award was, by the submission which was made a rule of court, to be made on or before the 1st of *December* 1810; but power was reserved to the arbitrators to enlarge the time for making their award, by indorsement for that purpose on the original rule of court. The award was in fact made and bore date on the 9th of *June* 1811, and the arbitrators therein stated that they had enlarged the time to a certain day, before which the award was made: but there was no affidavit of the fact of the time having been so enlarged, nor any affidavit that the defendant had been served with the rule of court having the indorsements for enlarging the time upon it: and it was now stated on his behalf by *Scarlett*, who shewed cause against the attachment, that the copy of the rule of court, with which the defendant had been served, had no such indorsements upon it; and therefore he objected that there did not appear to be any rule of court authorizing the award, so as to make the non-performance of it attachable as a contempt; nor any authority in the arbitrators for making their award after the time limited by the submission on the original rule of court. But in case the Court should think it sufficient if in fact the arbitrators had enlarged the time before it had expired, that fact, he insisted, ought at least to be verified by affidavit before the rule for the attachment went: and for want of such an affidavit the like rule was discharged in *George* v. *Lousley* (*a*).

Taddy, contrà, said that the defendant should have moved to set aside the award if not made under a regular authority, and could not object to it upon the rule for an attachment, except for some defect appearing on the face of the award. But here no such defect appears, as it did in *George* v. *Lousley*; for the arbitrators have stated in their award that they had enlarged the time; by which the defendant was now concluded. And he offered, according to instructions from his client in court, to produce the original rule of court by next *Thursday*, with the indorsements for enlarging the time regularly entered upon it: though he was not prepared to deny, on being questioned, that the copy of that rule, served on the defendant at the time the demand of the sum awarded was made on him, was without those indorsements.

(*a*) 8 *East*, 13.

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Lord ELLENBOROUGH, C. J. By the original rule of court, the enlargement of the time for making the award was to be indorsed upon the rule; and that is now stated to us to have been done. But it is not denied that the defendant was only served with a copy which had no such indorsements upon it, so as not to make it appear to him that the award was in time. He has therefore had no notice of his offence. He may have resisted payment of the sum awarded, under an idea that the award was not made within the time given by a proper enlargement of the authority; and therefore the plaintiff has not entitled himself to this attachment.

GROSE, J. agreed.

LE BLANC, J. There is no affidavit that the defendant has been served with a rule of court having those indorsements upon it.

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BAYLEY, J. The award was originally to be made on or before the 1st of *December* 1810; and not having been made within that time, it lies on the plaintiff applying for the attachment to shew that the defendant has been guilty of a contempt, by shewing that the arbitrators did enlarge the time.

Rule discharged.

A similar question arose upon the last day of this term, in a case of *Moule* v. *Stawell*, upon a rule for an attachment for non-performance of an award; where the award was made out of the time originally allowed, but authority had been reserved to the arbitrator to enlarge the time. And though the award stated upon the face of it that the arbitrator had enlarged the time, so as to cover the award; yet there being no affidavit of that fact, *the Court* refused the attachment; it not appearing to them judicially that the arbitrator had any authority to make the award, without which the Court had no jurisdiction.

Park and *Burrough* in support of the rule for the attachment. *Topping* and *Bayley*, contrà.

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Thursday, Feb. 6th.]

HUNTER *against* RICE.

Under a submission to an arbitrator of all matters in difference between landlord and tenant, the arbitrator awarded, inter alia, that a stack of hay, left upon the premises by the tenant, should be delivered up by him to the landlord by a certain day, upon the tenant being paid or allowed a certain sum in satisfaction for it. Held that the property in the hay did not pass to the landlord on his tender of the money, by the mere force of the award, against the consent of the tenant, who refused to accept the money or deliver up the hay; and therefore that the landlord could not maintain trover for it; but his remedy was upon the award.

IN trover for hay, which was tried before *Grose*, J. at *Derby*, the question was whether the property in the hay was transferred to the plaintiff from one *Sharpe* by force of an award, without the

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assent or delivery of *Sharpe*. The case in proof was that *Sharpe* was tenant to *Hunter* of certain land, on which the hay was stacked; and *Hunter* having brought an ejectment against *Sharpe* for waste, and there being other disputes on matters of account between them, they agreed to refer the whole to arbitration, and accordingly entered into submission-bonds, and the submission was made a rule of court. The arbitrator by his award, dated 8th of *October* 1810, reciting these disputes, and the pendency of the ejectment, awarded that *Sharpe*, before the 12th of *November* then next, should deliver up possession of the farm to *Hunter*, and also *the stock of hay*, straw, and manure thereon, *upon being paid or allowed out of the money hereinafter directed to be paid to* Hunter, 118*l.* 5*s.* *in satisfaction of the hay*, straw, and manure. The arbitrator also settled other payments to be made from one to the other of the parties on various matters of account between them: and then awarded that *Hunter* should, on the 12th of *November* then next, pay *Sharpe*, or permit him to deduct and retain out of the money to be paid by him to *Hunter*, 118*l.*5*s.* *in full satisfaction and discharge of the hay*, straw, and manure as aforesaid, *on having the same left on the premises aforesaid, and delivered up as is hereinbefore mentioned:* and awarded mutual releases. On balancing the different payments directed to be made between the parties by the award, it turned out that there was a balance of [101] 18*l.* due to *Sharpe* from *Hunter*. At the day mentioned in the award *Hunter* tendered the balance of 18*l.* to *Sharpe*, which was refused by the latter, who also refused to deliver up the premises, or to execute the award, and was afterwards evicted by ejectment, and is now in custody under an attachment for non-performance of the award. And having afterwards employed the defendant to take away the hay from the premises, which it appeared had been sold by *Sharpe*'s wife to another person, this action was brought long after the day of payment mentioned in the award, and after the tender of the balance by the plaintiff. It was objected at the trial that trover would not lie in this case, there being no property in the plaintiff, nor conversion by the defendant: but the plaintiff was permitted to take a verdict, with liberty to the defendant to move the Court to set it aside and enter a nonsuit; which was accordingly moved by *Clarke* in the last term, and a rule nisi granted. Against which,

Reader now shewed cause, and argued that it was not necessary, in order to maintain trover, that the plaintiff should have had a prior possession of the goods: it was sufficient that he had the property and right of possession. *Sharpe*, by his submission to the

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award, vested the power of disposing of the property in the arbitrator; and he by his award directed the plaintiff to pay a certain sum to *Sharpe* in full satisfaction of the hay, "on having it left on the premises (as it was), and delivered up to him, as is hereinbefore mentioned;" that is, as before expressed in the award, "upon being paid or allowed out of the money thereinafter directed to be
[102] paid to *Hunter*, 118*l.* 5*s.* in satisfaction of the hay," &c. Then when the balance of the sum was tendered by *Hunter* to *Sharpe*, which tender was equivalent to payment for this purpose, the property was absolutely transferred by virtue of the award: after which this action was brought. In *Phillimore* v. *Barry* (*a*), the property of goods sold by auction, to be paid for at a future day, was held to pass immediately to the buyer: and yet the authority given by the owner to an auctioneer is not greater than that given in this instance to the arbitrator.

Lord ELLENBOROUGH, C. J. There is a difference between property awarded to be transferred by the owner to another, and property which is actually transferred by the contract of the owner through the medium of his agent. In the present case, there is no other remedy for the plaintiff but to proceed against *Sharpe* upon the award. If, indeed, *Sharpe* had accepted the money tendered, that would have been a ratification of the award, and an assent on his part to the transfer of the property; but without that, I cannot conceive that the property was transferred by the mere force of the award. The plaintiff may act against the person of *Sharpe* if he do not obey the award. The bond fixes the penalty of his disobedience; and the rule of court is for enforcing his submission to the award under the peril of a contempt of court.

Per Curiam, Rule absolute.

Clarke and *Copley* were for the defendant.

(*a*) 1 *Camp. N. P. Cas.* 513.

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Thursday, Feb. 6th.

COOPER *against* SMITH.

A memorandum in writing of a contract for the purchase of flour by the defendant of the plaintiff, a miller, taken by the plaintiff's rider, in his common order-book, in these terms; "19th *Feb.* "1811—of "*John Smith*, "64*l.*" (which was explained by the witness to mean so much received of the defendant in satisfaction of a former order;) "*Do.* 40 *of* 3 ——58*l.*;" (which was explained to mean a new order for 40 sacks of flour called *thirds*, at 58*s.* a sack, and this without any [104] signature, is not a sufficient memorandum in writing of the bargain within the statue of frauds, 29 *Car.* 2. *c.* 3. *s.* 17. to bind the defendant; though it was read over to him by his desire at the time it was written. And such defective memorandum cannot be supplied by a letter written afterwards by the defendant, in which, though he recognized the order, yet he insisted that the flour had not been delivered in time, and therefore he was not bound to take it; and it was not competent for the plaintiff to prove, by the parol testimony of the person who took the order, that there was no such term in the contract as to deliver the flour within a given time.

THIS was an action for goods sold and delivered, which was tried before *Le Blanc*, J. at *Worcester;* and the question was whether there was sufficient evidence given of a contract in order to bind the defendant within the statute of frauds, 29 *Car.* 2. *c.* 3. *s.* 17. The evidence was of an entry in the order-book of the plaintiff's rider, who was employed by him in taking orders for flour from his different customers; which entry was dated the "19th *February* 1811," and ran thus; "Of *John Smith* 64*l.* 0*s.* 0*d.*" (This was explained by testimony to mean so much money received of the defendant in satisfaction of a former order.) And then followed, "Do. 40 of 3.——58*l.*" (which was explained to mean a new order for 40 sacks of flour called *thirds*, at 58*s.* a sack.) There was no signature of either of the parties, or of the witness who made the entry; but he proved at the trial, that after he had taken down the order in his book, the defendant desired him to read it over to him, which the witness did. He then proved that the flour was forwarded to *Pitchfork's* wharf at *Tutbury*, for the defendant, on the 6th of *March*. And then a letter was proved, which had been sent from the defendant to the plaintiff on the 8th of *March* 1811, when it bore date, at which time the flour had not reached the defendant. The letter was as follows: "Mr. *Cooper*, Sir,— "your not coming or sending the flour I agreed with you for, ac- "cording to time, I am now provided for; therefore it will not suit "me to receive yours, as the price is lower. I have been offered "flour a great deal lower this day. I expected yours in the course "of a week from the time you were at my house. If I buy of any "man, I expect it according to time, or the bargain is void." (Signed by the defendant.) In answer to this a letter was sent by the plaintiff, dated, "*Tutbury* mill, *March* 21st, 1811. Sir,—The "40 sacks of flour my brother sold you, I understand you have re- "fused to receive, on the score of its being out of time; which "circumstance remains to be proved, and which I shall put to "the test. However, I beg to inform you, that the flour is now "at *Pitchfork's* wharf, and at your risk; and when the payment "becomes due, we will see how the matter stands." (Signed by the plaintiff.) There was further proof of an invoice sent by the

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" plaintiff to the defendant: " *Tutbury, March* 5th, 1811. Mr. " *J. Smith*, bought of " *G. Cooper*,

			£.	s.	d.
" 40 sacks of 3ds.	58*l.*	- - -	116	0	0
" 40 sacks -	5*l.*	- - -	10	0	0
			126	0	0"

Accompanied by a note from *Cooper*'s clerk, addressed to the defendant: " Sir,—The above was yesterday forwarded per *Smith* " and Son's boat, which I have no doubt will be with you very " soon." There was also proof of demand of payment by the plaintiff, and refusal by the defendant, before the action brought. The objection taken was that this was not a good bargain to bind the
[105] defendant within the statute of frauds; the memorandum not being made and signed by the parties to be charged therewith, or by their agents lawfully authorized: and that this was not supplied by *Smith*'s letter, which, though it admitted a bargain made for flour, yet insisted that it was to be delivered within a week; and that he had rejected it, because it was not delivered in time. The fact of the contract, as proved by the plaintiff's witness, being left to the jury, they found for the plaintiff; but the question of law was reserved by the learned Judge.

Jervis moved in the last term to set aside the verdict and enter a nonsuit, upon the objection taken at the trial; distinguishing this from the case of *Saunderson* v. *Jackson* (*a*), where the name of the vendor, who was the defendant in the action for non-delivery of the goods, was printed in the bill of parcels delivered by him to the vendee at the time of the order given for them; in which bill of parcels the purchaser's name was also inserted (*b*); and a letter was afterwards sent by the vendor to the vendee referring to the order. And from *Egerton* v. *Matthews* (*c*), where the memorandum of sale was signed by the vendee, who was charged, though not by the vendor, who was the plaintiff in the action: but which memorandum contained in itself the names of both parties, and all other indicia of a perfect contract. Here, he observed, the seller's name was not mentioned in the contract, which in that and other respects was to be supplied by parol evidence; and there was no-
[106] thing in writing on the part of the purchaser who was to be charged, except the subsequent letter, which disaffirmed the contract as

(*a*) 2 *Bos. & Pull.* 238.
(*b*) This was stated in *Champion* v. *Plummer*, 1 *New Rep.* 254.
(*c*) 6 *East*, 307.

proved by the plaintiff's agent: the case therefore stood upon the original memorandum, which, not being evidence to bind the seller within the statute, could not bind the purchaser. And he likened this to the case of *Champion* v. *Plummer* (*a*), where the memorandum of sale not mentioning the name of the purchaser, and signed only by the seller, was held insufficient to bind the latter in an action for the non-delivery of the goods.

The Court, upon granting the rule nisi, inquired whether the order-book, which they desired to see when the cause came on again, purported on the face of it to be a memorandum book of the orders received by the plaintiff. But nothing of the kind appeared, as it was afterwards admitted; and therefore the case stood upon the evidence before mentioned, as it appeared upon the learned Judge's report.

Puller now shewed cause against the rule, and endeavoured to shew that the plaintiff's rider, who took the order, was the agent of both parties, adopted by the defendant at the time, by his making him read over the contract to him immediately after it was written; and thereby assenting to his agency and making the written contract his own. As in the case of a broker, who though employed by the seller, has been held to bind the buyer also by the writing and delivery of the *bought* and *sold-notes* to the respective parties; which was first admitted by Lord *Kenyon* in *Rucker* v. *Cammeyer*(*b*), and has since been frequently recognized. Though he admitted that [107] in *Wright* v. *Dannah* (*c*,) where the memorandum was written by the seller himself, though overlooked by the buyer at the time, who made him alter it in part, Lord *Ellenborough* did not consider that as an adoption of the seller by the buyer as his agent; holding it necessary that the agent to be so adopted should be some third person, and not one of the contracting parties. But that exception does not apply to this case. He also observed upon the adoption in part of the contract by the letter of the defendant, written afterwards (as in *Saunderson* v. *Jackson*, (*d*); and though the defendant therein insisted upon the delivery of the goods within a certain time as a term in the contract; which did not appear to have been done; still he admitted the sale, which was sufficient to take the case out of the statute: and it then became a question for the jury whether the delivery was in time; which fact they had found for the plaintiff, according to the evidence of the plaintiff's witness.

Lord ELLENBOROUGH, C. J. The plaintiff cannot avail himself of that letter as evidence of the contract for one purpose, to

(*a*) 1 *New Rep.* 252. (*b*) 1 *Esp. N. P. Cas.* 105.
(*c*) 2 *Campb. N. P. Cas.* 203. (*d*) 2 *Bos. & Pull.* 238.

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bind the defendant within the statute, and renounce it for another purpose; but he must take it altogether; and then it falsifies the contract proved by parol testimony for the plaintiff. Here there was neither the signature of the parties nor of their agent to bind the bargain.

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LE BLANC, J. The letter of the defendant referred to a different contract from that proved on the part of the plaintiff, which puts him out of court, instead of being a recognition of the same contract, as in a former case.

Per Curiam (*a*), Rule absolute to enter a nonsuit.

(*a*) BAYLEY, J. was sitting at *Guildhall*.

Friday, Feb. 7th.

COWLAM *against* SLACK.

Common appurtenant may be claimed, as well by grant within time of memory, as by prescription: and after a unity of possession in the lord of the land, in respect of which the right of common was claimed with the soil and freehold of the waste, evidence that the lord's tenant of the land had for 50 years past enjoyed the right of common

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on the waste is evidence for the jury to presume a new grant of common as appurtenant so as to support a count in an action by the tenant for surcharging the common, declaring upon his *possession* of the messuage and land, with the appurtenances, and that by reason thereof he was entitled of right to the common of pasture *as belonging and appertaining* to his messuage and land: and also to support another count, in substance the same, alleging his possession of the messuage and land, and that *by reason thereof* he was entitled to common of pasture, &c.

THE plaintiff declared that before, and at the time of committing the grievances after mentioned, he was, and from thence hitherto had been and still is, *lawfully possessed* of a certain messuage, and 250 acres of land, *with the appurtenances*, in the parish of *Crowle*, in the county of *Lincoln*; and *by reason thereof* during all the time aforesaid hath had, and of right ought to have had, and still of right ought to have, *common* of pasture for all his commonable cattle levant and couchant in and upon his said messuage and land with the appurtenances, in, upon, and over certain large wastes or commons in the parish aforesaid, to wit, &c. *Ealand Carr* or *Bolton*, (and so mentioning several other commons, some of them stinted,) *as belonging and appertaining* to his said messuage and land with the appurtenances, &c.: and then alleged a grievance to him by the defendant's surcharging the said common and waste grounds. A second count, to the same effect, laid the plaintiff's messuage, land, and appurtenances, as being within the *manor* of *Crowle*. A third count, more general, stated the plaintiff's lawful possession, at the time of the grievance, of the messuage and land, *with the appurtenances; and that by reason thereof* he was entitled of right to *common of pasture* in, upon, and throughout *all the commonable waste grounds* in the said parish of *Crowle*, *for all his commonable cattle*

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levant and couchant *in and upon his said last-mentioned messuage and land, with the appurtenances;* (without claiming such right of common *as belonging and appertaining* to his messuage and land:) and then it proceeded, as before, to state the disturbance of the plaintiff's right by the defendant's surcharging the common.

The cause was tried before *Grose*, J. at the last assizes at *Lincoln*, when it appeared that the plaintiff, his father, and grandfather had occupied the manor house and farm for above 50 years past, during all which time they had constantly stocked and enjoyed the common. But it appearing also, upon cross-examination, that the messuage and farm were so held by the plaintiff and his ancestors, *as tenants to the lord of the manor*, the objection was taken that neither the lord nor his tenants could have a right of common upon the lord's own soil, but that the unity of possession extinguished the common; and the learned Judge, being of that opinion, nonsuited the plaintiff.

Clarke, in moving to set aside the nonsuit, contended that it was competent to the lord to grant a right of common at this day to his own tenants over his own wastes, according to the case of *Bradshaw* v. *Eyre* (*a*); and that the manner in which the commons had been enjoyed by the tenants of the farm in question was evidence to the jury that the lord had made such a grant. This, he said, had never been questioned in the case of re-grants of estates which had fallen in by escheat to the lord. The Court gave a rule nisi, against which

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Reader and *Copley* now shewed cause. It cannot be disputed but that unity of possession of the waste with the land in respect of which a right of common is claimed on such waste will extinguish the right of common: which is admitted in the very case cited of *Bradshaw* v. *Eyre*. And though the user of the common in the manner proved for the last fifty years, might upon the principle of that case, have been evidence of a new and express grant of common to the tenants; yet no such question was made at the trial: and in *Kindred* v. *Bagg* (*b*) the Court refused to set aside a nonsuit, on the ground that the case ought to have been submitted to the jury; because the point was not made by the plaintiff at the trial. But supposing that difficulty were out of the way, the plaintiff is not entitled to recover upon any of the counts in the declaration; for in the two first it is laid to be common *appurtenant:* but that was put an end to by the unity of possession, and could not be set up again without a new grant from the lord,

(*a*) *Cro. Eliz.* 570. (*b*) 1 *Taunt.* 10.

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which was not attempted to be proved. Nor is the allegation in the latter count substantially different; for though the common is not there said to be *appurtenant*, yet* it is laid that *by reason thereof* (i. e. of his possession,) the plaintiff was entitled to common: but that could only be by prescription; for if it were by grant or licence of the lord, such right would be by force of the grant or licence, and not merely by reason of the possession. As in *Fentiman* v. *Smith* (*a*) where in case for obstructing a water-course to a mill, the plaintiff declared on his possession of the mill, with the appurtenances, and that *by reason of such his possession* he had a right to the use of the water running to the mill, &c.: this was held not to be proved by shewing that he had a licence from the defendant to lead the stream over his land, which licence was revocable and revoked. In the case of *Bradshaw* v. *Eyre*, the defendant in his plea expressly stated the new grant (subsequent to the unity of possession) of the messuage and land, with all commons, &c. thereto appertaining, *or occupied or used therewith;* which would have let in the evidence of user if it could have been shewn; but it was not. Besides, the evidence given at the trial was as applicable to the case of a mere *licence*, as of a grant from the lord: but a licence gives no interest in the land; and one who claims by reason of his possession of a messuage or land must shew a permanent interest in the soil in respect of which he claims, which a licence does not confer.

The Attorney-General, Clarke, Rough, Serjt., and *Denman*, in support of the rule. As to the latter point, the fact of the tenants of the farm having always turned out their cattle on the common was evidence that they had an interest in the common in respect of their possession of the farm, and not merely that they did it by

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licence. This interest might arise, since the unity of possession, by a new grant from the lord; and, therefore, the user of the common was proper evidence of such a grant: but the nonsuit proceeded on the ground that the claim of common could only arise by prescription, which was extinguished by the unity of possession. Here, however, a possessory right only is stated by the plaintiff, and that did not want the support of a prescriptive title. But it may be presumed, if necessary, that when common was originally granted out by the first lord, he reserved the use of it for his own tenants at all times to come. [Lord *Ellenborough*, C. J. Every thing that the lord does not grant out remains in him, without any special reservation. No right of common, as such, subsists in the lord, but the full right of dominion so far as he has

(*a*) 4 *East*, 107.

not granted it away.] The case of *Bradshaw* v. *Eyre* (*a*) is decisive that a right of common may be revived by a new grant after the extinction of the prescriptive right by a unity of possession. Upon the union, the owner of the soil takes it discharged of the old right of common: but he may charge it again by a new grant to another. All the authorities shew that common *appurtenant* may exist either by prescription or by grant, and *Co. Lit.* 121. says that it may be created at this day. As soon therefore as it was, or may be presumed to have been granted, the right of common became and was *appurtenant* to the land demised: and if so, all the counts are sustainable; though it is sufficient for the present purpose if the last count be sustained. The proof was that the several tenants of the farm in succession for above fifty years under different lords had all enjoyed the common by their cattle levant and couchant on [113] the farm: and the constant enjoyment of a thing is evidence of a a right to enjoy it. It would be evidence against the lord himself, and still more against a stranger. [Lord *Ellenborough*, C. J. asked if there were any precedents of a claim of common, by reason merely of the plaintiff's possession of land, without stating it to be by prescription or by grant?] There is no necessity for a plaintiff in a possessory action against a wrong doer to state his title; but it is sufficient for him to state that he was possessed of his land, and that *by reason thereof* he was entitled to common (*b*): [*Le Blanc*, J. May not common be claimed as *appurtenant* generally; and then as prescription supposes an original grant, may not the right be proved either by prescription, or by grant within time of memory? And though it may not have been usual to claim it in this way, I do not see why it may not be so claimed.] In *Musgrave* v. *Cave* (*c*) it was said not to be necessary in pleading common to allege expressly whether it was appendant, appurtenant, or in gross; though it was there held to appear sufficiently, from the nature of the common claimed, that it was appurtenant; and there seems to be no more reason why it should be alleged to be by prescription or grant.

The case stood over for consideration for a few days, and now Lord ELLENBOROUGH, C. J. delivered the judgment of the Court. This was a motion for a new trial in a cause tried before [114] my Brother *Grose* at *Lincoln*, and the only question was whether

(*a*) *Cro. Eliz.* 570.

(*b*) The distinction is taken in a note by Mr. Serjt. *Williams* to the case of *Mellor* v. *Spateman*, 1 *Saund.* 346. which was referred to, and where the cases on the subject are collected.

(*c*) *Willes*, 319.

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the nonsuit was maintainable, upon the ground that the evidence did not support the declaration. The plaintiff had alleged a disturbance of his right of common for all commonable cattle, levant and couchant on his land; and which right he claimed in all the counts of his declaration, but the last, as *belonging and appertaining to the said closes of land;* and in the last count, after stating that he was *possessed of such closes*, he alleged "that *by reason thereof*" he was entitled to the same right of common in the place in question. It appeared in evidence that the plaintiff was tenant to the lord of the manor of the closes in respect of which the common was claimed, and of course, that as any right of common, which might have been antecedently appurtenant to these lands, became extinct by an union of them which had taken place in the hands of the lord with the soil out of which such common was claimed, the tenant could not claim the common in question in right of his land, as *appurtenant*, after such union had taken place. But inasmuch as the tenant, and his father before him, had for a long series of years actually enjoyed this common, it was contended before us, (for no such point was made below,) on the part of the plaintiff, that such enjoyment laid a foundation for presuming a new grant from the lord, and which presumption ought to have been left to the jury: supposing that any new grant could in point of law have sustained the allegation of common *belonging and appertaining* to the plaintiff's lands, which occurs in all the counts but the last; and of his being entitled to common *by reason thereof*, which occurs in the last count. Upon consideration there does not appear to be any material difference in point of legal effect between the claims of common as made in these several counts: in all, the claim is in substance a claim of *common appurtenant* to the closes in respect of which the common is claimed. And the only question upon the argument, of which the Court wished further to consider, was whether common appurtenant, for which as is said in the text of *Co. Lit.* 122, one must *prescribe*, is, as suggested in the notes of the learned commentators, also claimable *by grant* as well as *by prescription*. It certainly occurs in favour of such claim by grant, that as prescription is only evidence of an immemorial grant, by which in time beyond memory the right then began to exist, it may equally begin to exist through the same medium, i. e. of grant, now shewn, or fairly to be presumed from usage, at the present day. The case of *Bradshaw* v. *Eyre*, *Cro. Eliz.* 570, which was a case similar to the present, as far as the extinction of common by unity of possession is concerned, did not afford an express authority for the creation of common strictly *appurtenant*

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by a new grant at the present day; because the lease contained not only the words all commons, profits, and commodities *thereto appertaining;* upon which the argument for common appurtenant might be built; but the further words, "*or occupied or used with the aforesaid messuage;*" which latter words might import a substantive new grant in gross of common to the tenant, by words of reference to antecedent usage and enjoyment as the measure of its future enjoyment, and not strictly an annexation of such right de novo as an appurtenant to the lands, &c. in question. However the case of *Sacheverell* v. *Porter* in *Cro. Car.* 482, referred to in the fourth note upon *Co. Lit.* 122., but much better reported in Sir *William Jones*, 396, is decisive upon the question. According to [116] Sir *William Jones*, *Sacheverell* brought trespass against *Porter* for breaking his close and consuming his grass with his beasts in *Cripplestone* in the county of *Stafford*. And the case was such upon the pleading and special verdict, that *Foulke Pembridge* was seised of *Whitenall* waste in *Crippleston*, and the prior of *Stone* was seised, in right of his church, of three messuages, one hundred acres of land, &c. in *Stullington* in the county aforesaid; and being so seised the said *Foulke* by his deed 2 *H.* 4. granted to the said prior and his successors common of pasture for himself and his successors, and his tenants, in *Stullington*, in the said waste. The priory was dissolved and came to king *Hen.* 8th, and by descent to queen *Elizabeth*, who by letters patent granted it to *Rowland Hill* in fee, and from him by mesne conveyance it came to one *Warlowe*, who enfeoffed the defendant of thirty-three acres, parcel of the lands in *Stullington*, with the appurtenances in fee; and he put his beasts into the waste land to take his common; and the plaintiff being owner of the waste brought trespass. And it was adjudged, upon argument at the bar by *Rolle* and Serjt. *Milward*, by all the Court, *Brampston*, *Jones*, *Crooke*, and *Barkley*, that the action does not lie. And by all the Court these points were adjudged; first, when the said *Foulke* granted to the prior, for him and his tenants of *Stullington*, common of pasture; this was *common appurtenant*, and this may be as well *by grant as by prescription*. The other points are not material to be here stated. It appearing from this pointed authority, in confirmation of the reason of the thing upon principle, that common appurtenant, (such as was claimed by the plaintiff's declaration,) may be created by modern grant, it was proper that the [117] jury should have had the usage in this case left to them, as a foundation whereupon they might or might not, according as the evidence of enjoyment would have warranted them, have presumed such a grant to have been made by the lord to the plaintiff or his

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father, as would have sustained the right claimed of common appurtenant in respect of their lands. And as this was not done, we think the nonsuit should be set aside, and a new trial granted.

Saturday, Feb. 8th.

The KING *against* The Archbishop of CANTERBURY and the Bishop of LONDON.

The Court discharged a rule for a mandamus to the Bishop of *London* to license a clerk chosen by the inhabitants of St. *Bartholomew, Exchange, London*, to an endowed lectureship in the parish church

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there, upon affidavit made by the Bishop that the party elected had been admitted before him with a view to his being "*approved and licensed*," (which are the words of the stat. 13 & 14 *Car.* 2. *c.* 4. *s.* 19. imposing that function upon the Archbishop or Bishop before any lecturer may lawfully preach;) that he had made diligent inquiry concerning his conduct and ministry, and being convinced from such inquiry *that he was not a fit person* to be allowed to lecture, he had conscientiously determined, after having heard him, *that he could not approve or license him thereunto*. And the rule which included the Archbishop of *Canterbury*, as well as the Bishop, in the alternative, was also discharged as against the former (against whom it was not pressed); though it was considered to be equally open to the party to make a substantive application against the Archbishop, if he declined to inquire as to his fitness, with a view to approve or disapprove of him as a fit person to be licensed.

THE Court having in last *Easter* term *(a)* discharged a rule for a mandamus to the Bishop of *London*, obtained on the application of the Rev. *Richard Povah* to license him to the endowed lectureship at the parish church of *St. Bartholomew, Exchange, London;* which application had been made on the ground that he had been chosen to be lecturer by a majority of the inhabitants of the parish, to whom the choice was given by the founder, and had tendered himself to the Bishop with the usual credentials of his election, and of his being in priest's orders, and had offered to read and subscribe the thirty-nine articles, as required by the act of uniformity, 13 and 14 *Car.* 2. *c.* 4. *s.* 19.; but that the Bishop had finally refused to license him, on the general ground that he *did not approve of him as a fit person for the lectureship*, without specifying the reasons of such unfitness, or personally examining the applicant in that respect, though required so to do: and that rule having been discharged on a preliminary objection taken to it, that no previous application for a licence had been made to the Archbishop of *Canterbury*, as well as to the Bishop, both of whom were severally authorized by the act of uniformity to grant such licence:

Garrow, in the last term, applied for and obtained a rule upon the Archbishop and the Bishop, "to shew cause why a mandamus should not issue to them or one of them, calling upon them or one of them to admit *Richard Povah*, LL.D. before them or one of them, to read in the presence of them or one of them the thirty-nine articles of religion, mentioned in the stat. 13 *Eliz.*, with declaration of his unfeigned assent to the same, and also to

(*a*) 13 *East*, 419.

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do and perform all other matters and things required by law to be done by him, in order to the said *Richard Povah*'s being licensed to preach the *Friday* morning lecture at *St. Bartholomew, Exchange, London;* and also commanding them or one of them that they or one of them do thereupon, if the said *Richard Povah* shall by them or one of them be found to be a fit and proper person to preach the said lecture, license him accordingly."

In addition to the like affidavit on which the former application had been made respecting the general circumstances and merits of the case, which turned principally upon a charge alleged on the [119] one part, and denied on the other, that Dr. *Povah* had preached against infant baptism; the present rule was grounded upon further affidavit of the like application having been made to the Archbishop for a licence to Dr. *Povah;* to which the Archbishop, on the 25th of *June* last, returned for answer, that having considered that section of the act of uniformity, which directs the proceedings of the Archbishop and Bishops in the matter of granting licences to lecturers, he thought it his duty *to decline interfering in the case* submitted to him. The affidavit of Dr. *Povah* also stated another application to the Bishop of *London* for a licence, since the former rule was discharged, and his Lordship's continued refusal. And by way of answer to the objection, before urged by the Bishop, of the deponent's unfitness, he stated that the Bishop had refused to call upon him to meet his accuser in his (the Bishop's) presence, in order to his entering into an examination of the truth or falsehood of the charge exhibited against the deponent; and that the Bishop had also declined to enter into the ability and moral fitness of the deponent, although he had frequently called upon his Lordship to point out or institute any satisfactory mode of examination and enquiry, and was still ready and desirous that such an examination and inquiry should take place. The affidavit of Dr. *Povah,* which was of great length, also stated minutely all the circumstances attending his original application to the Bishop, with the correspondence which had taken place between them, and with others, upon the ground of the different charges which had been made or were surmised by himself to have been made against him to the Bishop, with his answers to the same: but as this statement is confined to the general ground of unfitness, upon which the Bishop's refusal [120] to license seemed ultimately and principally to rest, and on which the judgment of the Court in point of law turned, I forbear, for brevity sake, to state any part of the affidavits, in support of or in answer to the particular charge against Dr. *Povah,* before

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stated, which were alluded to by the Lord Chief Justice in delivering his opinion upon the merits of the case. It appeared upon the whole that Dr. *Povah* had had several interviews with the Bishop, and had been informed by his Lordship of the general nature of the principal charge preferred against him, of having preached against infant baptism, mixed with other matters of objection; and had heard what he himself had to say in answer to the charges, and received documents of his own and others confirmatory of his denial of them. But the ground of this complaint seemed to be that the Bishop would not on any of those occasions disclose his informant, nor appoint a time and place for hearing Dr. *Povah* and his accusers face to face, as he urged the Bishop to do. But the information on which the Bishop had acted was now disclosed in the affidavits of the several persons by whom it was communicated.

In answer to the writ now prayed for, the principal affidavit, upon which the decision of the Court mainly rested, was that of the Bishop of *London;* in which his Lordship stated "that the said *Richard Povah* had been repeatedly admitted before the deponent, with a view to his being approved and licensed by him to preach the *Friday* morning lecture, &c. That he had made diligent inquiry respecting the conduct and ministry of the said *Richard Povah* as a clergyman; and that being convinced from such inquiry that he was *not a fit person* to be allowed to preach
[121] the said lecture, he, the deponent, had conscientiously, and according to the duty of his office, as Bishop of *London,* and for no other motive or reason whatsoever, decided and determined, after the said *Richard Povah* had been so admitted before him, and after having heard him, that he cannot approve or license him thereunto. That such decision was formed by him and is still adhered to upon a full and deliberate consideration of all the circumstances he hath been able to learn respecting the said *Rd. Povah*; and that in forming such decision, and through the whole of this transaction, he has acted according to the best of his judgment, and from a conviction that the duty imposed upon him by his office requires that he shall not approve of or license any one to a lectureship whom he does not in his conscience believe to be a fit person to fill the office: and that he had, in his affidavit made upon the former application to this Court, stated the grounds and reasons upon which his said decision was formed; to which, if the Court should think fit to inquire into them, he craved leave to refer. That he had not called the said *Richard Povah* before him to read the thirty-nine articles of religion, or to

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do or perform any other matters or things required by law to be done by him in order to his being licensed to preach the said lecture; because he cannot approve him as a fit person to be so licensed; and because such matters and things are not usually done, unless the person applying to be licensed has been previously approved." Also the accustomed form of the licence given to lecturers by the Bishop of *London* was set forth in the affidavit of the Bishop's secretary; which licence begins thus: "*John*, by divine permission, Bishop of *London*, to our beloved in *Christ*, greeting: We do by these presents give and grant to you, (*in whose fidelity, morals, learning, sound doctrine, and diligence we do fully confide,*) our licence and authority to perform the office of lecturer in the parish church," &c.

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When the rule was moved for in the last term*, in its present form, and it was opened to the Court that the Archbishop, on application to him for the licence, had declined interfering in the matter; Lord *Ellenborough*, C. J. suggested that the writ should be directed to the Archbishop in a different form; namely, *to hear* as well as to decide on the application. And on the next day his Lordship again said, that it appeared to the Court in the present state of the case, as disclosed by the affidavits, to be more proper to grant a rule on the Archbishop alone, as one of the persons to whom the act of uniformity has directed the application to be made, commanding him to hear and determine the application for the licence; for the Bishop of *London* had already heard and determined the matter, by refusing the application on the ground of unfitness of the candidate. Dr. *Povah*'s counsel thereupon desired time to consider of the matter; and two days after they repeated their application to the Court for the rule against both in the form above stated; which was then granted accordingly; the Court desiring to have it understood that the party took it in this form upon his own responsibility, and not on the suggestion of the Court (*a*).

* *Monday*, *Nov.* 18th.

The Attorney-General, *Dampier*, and *Abbot* now shewed cause against the rule; and after noticing the informality of it, in first requiring the defendants, or one of them, to admit Dr. *Povah* to read before them the 39 articles, &c. in order to his being licensed; and then, if they found him a fit person, to license him; instead of requiring them to examine into his fitness in the first place; and then, if they found him fit, to hear him read the articles; they objected mainly to the substance of the application, particularly as it affected

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(*a*) This was in allusion to what had been said upon the former application against the Bishop.

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the Bishop; insisting, that by the terms and sense of the act of uniformity the legislature had left it to his judgment to determine whether the person applying to be licensed was a *fit* person; and that as the Bishop had pronounced him unfit, his judgment was conclusive and could not be questioned in this court. By the 36th canon of 1603, it is provided, that "no person shall be received into the ministry, or admitted to any ecclesiastical living, or suffered to preach, catechise, or be a lecturer, &c. except he be licensed either by the Archbishop or by the Bishop of the diocese, or by one of the two universities, and except he shall first subscribe to the three articles therein mentioned." Then the act of uniformity, 13 & 14 *Car.* 2. *c.* 4. *s.* 19. enacts, that no person shall be received as a lecturer, &c. "unless he be first *approved*, and thereunto *licensed* by the Archbishop of the province, or Bishop of the diocese, or (in case the see be void) by the guardian of the spiritualties under his seal, and shall in the presence of the same Archbishop, or Bishop, or guardian, read the 39 articles," &c. The word *approved*, is a significant word, extending the canon in regard to lecturers; and, therefore, the rule for the mandamus should have been to the bishop to *approve* of the applicant, which would at once have exhibited to the Court the true nature and end of the proposition contended for, but which is kept out of its view by the form of the present rule. For how can the Court grant a mandamus to the Bishop to approve of one whom he dis-
[124] approves of, and command him to act against his judgement in a matter which the legislature have confided to his judgment. The affidavit of the Bishop is conclusive upon this point; that he had inquired into the conduct and ministry of the applicant with a view to his being approved and licensed by him, and that from such inquiry the Bishop, in the conscientious discharge of his duty and office, was convinced that the said *Richard Povah* is *not a fit person* to be licensed, and that he cannot approve of or license him. For the grounds of his judgment the Bishop refers generally to his former affidavit; but the Court need not inquire into those grounds. It is contended, however, on the part of the applicant, that the Court have authority to oblige the Bishop to grant a licence, if he improperly refuse it; and that therefore when called upon he must state the grounds of his refusal, of which the Court will judge. But there is no direct authority for the proposition to that extent, and the effect of it would be to transfer to this Court the exercise of that discretion which the legislature meant to vest in others. It must then take cognizance of matters of religious doctrine and church discipline, which belong to

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another forum. They said that in all the cases prior to that of *The King* v. *The Bishop of London*, in last *Easter* term (*a*) the real dispute has been between other parties contending for some temporal right, thoguh some of them may have asserted their claims under the Bishop's name: but there is no instance where the Court has interfered by way of mandamus against the Bishop himself, after he had determined against the personal fitness of the applicant for the licence, in abrogation of that judgment. The very form of the licence, which declares the Bishop's personal confidence in the "fidelity, morals, learning, sound doctrine, and diligence" of the party, precludes the interference of another power with the judgment and conscience of the licenser. If the Bishop were commanded to license one of whom he disapproved in any of these particulars, how strangely would the licence read; expressing his own opinion of the unfitness of the party in that respect, but that nevertheless in obedience to the writ of mandamus issued by this Court, he licensed him to preach, &c. Some dicta of Judges are to be found, as in the case of *The King* v. *The Bishop of London* (*b*), that this Court will not suffer the Bishop to exercise arbitrarily the power given to him by the statute; but that where a person appears to have a right, they will compel the Bishop to grant a licence, *or shew good reason to the contrary:* but this does not shew that the judgment of the Bishop upon a matter, of which he has exclusive cognizance, such as the question of fitness of the applicant of whom he is to approve before he licenses him, is not a good reason against the interference of the Court by mandamus. And so in the case of *The King* v. *The Churchwardens of St. Bartholomew*, which is there referred to by Ld. C. J. *Lee*, from his own note, Lord *Holt* is made to say that the ordinary had not an arbitrary power to license or not, but was bound ex justitia to license "*if the person were orthodox*, and an honest liver, and loyal." But is not the Bishop to be the judge of the orthodoxy and morals of the candidate? *Salkeld*'s report (*c*) of the same case says, "It is true a man cannot be a lecturer without a licence from the Bishop or Archbishop; *but their power is only as to the qualification and fitness of the person*, and not as to the right of the lectureship." This admits the Bishop, &c. to be the proper judge of the party's qualification and fitness. In the report of the same case in *Mod.* Lord *Holt* is made to say "that let a parson be ever so orthodox

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(*a*) 13 *East*, 419. in which most of the prior cases are collected.

(*b*) 13 *East*, 420. note. S. C. 1 *Wils.* 11. 15.

(*c*) The case of *The Churchwardens of St. Bartholomew*, 3 *Salk.* 86. S. C. *Holt's Rep.* 418. and 12 *Mod.* 433.

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and able, yet he is punishable for his presumption if he preach without licence of the ordinary; but the ordinary ex debito justitiæ ought to give such licence to one that is *fit*: but if he refuse, no mandamus lies, but his remedy is *to appeal*." In the same sense is to be understood the dictum of *Powell*, J. in *Colefatt* v. *Newcomb* (*a*) that "since the act of uniformity, if the Bishop denied to grant a licence to a parson *who was fit to preach*, they would grant a mandamus to him to grant one; and that by the act of uniformity the ecclesiastical jurisdiction was saved." And so is the dictum of Lord *Mansfield* in *Rex* v. *Blooer* (*b*), "that if the Bishop had refused, *without cause*, to license him, he might have a mandamus to compel the ordinary to grant him a licence." The truth is that no power is given to any Court or person to be exercised capriciously and arbitrarily; but if they pronounce judgment upon a matter within their jurisdiction, such judgment is conclusive, unless there be a power to remove the cause by appeal or writ of error. The judgments of this Court can no otherwise be questioned: in all matters within its discretion, its judgment is conclusive. So it is with the Bishop, in respect of the question of fitness: this Court will not interfere with his judgment in that respect, any more than with his judgment in granting orders, or
[127] accepting or refusing resignation. It will not interfere to compel commissioners of bankrupt to sign a bankrupt's certificate (*c*), because the legislature has vested a discretionary power in them to judge of the bankrupt's conformity or nonconformity: nor will it compel a justice of peace to grant an ale licence (*d*); nor to make a rate of wages (*e*), though they will grant a mandamus to the justices to hear and decide upon an application for such a rate. In *Specot*'s case (*f*) it was indeed held that the Bishop could not in a plea in Quare impedit defend himself by a general allegation, that he rejected the clerk presented to him for institution to a benefice on the general ground that he was schismaticus inveteratus, without stating in what respect; for that the cause of refusal was traversable. In which case it was said that if the cause be traversed, and the party refused be alive, it shall be tried by the metropolitan: and if he be dead, it shall be tried by the country. But the doctrine of that case was much shaken, if not denied, in *Hele* v. *The Bishop of Exeter* (*g*). Besides, there is a

(*a*) 2 *Ld. Ray.* 1206. (*b*) 2 *Burr.* 1045.
(*c*) In the matter of *John King*, 7 *East*, 92. note.
(*d*) *Giles*'s case, 2 *Stra*, 881. and *Rex* v. *Young and Pitts*, 1 *Burr.* 561.
(*e*) *Rex* v. *Justices of Kent*, 395, 7. (*f*) 5 *Rep.* 57.
(*g*) *Show. P. C.* 88.

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great difference between the cases of advowsons, where the temporal right of the patron to present a fit person is in question, and where the stat. de Articulis Cleri, *c.* 13. only requires the *examination* of the ordinary as to the fitness of the clerk presented, and the case of lectureship, where the act of uniformity requires also the *approbation* of the bishop. For there may be many reasons for not approving of a person, as on account of the dubiousness of his doctrine, which might not directly amount to heresy or schism, so as to warrant the rejection of him as a clerk presented to a benefice. They also discussed the merits of the application to the Bishop, as they appeared upon the affidavits on both sides, in respect to the charges in matters of doctrine and discipline alleged against Dr. *Povah*.

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With respect to this application as it particularly affected the Archbishop; after stating his Grace's readiness to submit to the direction of the Court; they said that the office at *Lambeth* had been searched, and no instance found of such an application to the Archbishop; and they argued that it never could have been the intention of the legislature to give so anomalous an appeal as from the judgment of the Archbishop to the Bishop who is his inferior, to which the construction contended for would necessarily lead; for the party might first apply to the metropolitan; and in case of his refusal, to the Bishop. They therefore contended that the true construction must be to give the party an election to apply to either, but not to both of them in succession. Lord *Holt* indeed in the passage before cited from 12 *Mod.* 433., seems to have thought that an appeal would lie by the ecclesiastical law, in a different form, from the judgment of the Bishop refusing the licence to the Archbishop: but they said that they were not apprised of any such appeal in fact; and that the granting of this mandamus would carry the question from the Archbishop and Bishop, and from the ecclesiastical courts, to a jury. If it were necessary for a party to apply for a licence to both the Archbishop and Bishop, no mandamus for a licence was ever before properly granted on the refusal of the Bishop alone. They admitted that, upon search by the officers in the archives of the Archbishop, instances were found of applications to him for licences within his own peculiar diocese, which he has distinct from his metropolitan jurisdiction; but none of applications to him as Archbishop within his province. And this they also suggested might account for his being named with the Bishop in the 19th clause of the act of uniformity.

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Garrow, C. Warren, Comyn, and *Brougham,* in support of the

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rule, observed, in answer to the preliminary objection to the form of it; namely, that the things required to be done were expressed in an inverted order; that the 36th canon requires the party's subscription to the 39 articles, &c. as a test of his uniformity, and the examination of the Bishop himself, as a test of the party's general fitness; and it was immaterial which of these the Bishop required first, as both the tests must be satisfied before the licence was granted, and there was no reason for preferring one to the other. They then contended, first, that Dr. *Povah*'s case had not been regularly and fully heard upon the merits before the Bishop, against whom they seemed to press the rule most: [for as to the Archbishop, they said that the application had only been made to him in consequence of the difficulty which had occurred to the Court upon the discussion of the former rule against the Bishop, whether the writ could issue to him before it was known whether the party might not obtain a licence from the Archbishop:] and their observations on this part of the case were confined to the conduct of the Bishop. They entered at large into the nature of the doctrinal charges urged against Dr. *Povah*, and his answers to them; in doing which they complained on his part that he had not had such a trial as the law requires. No opportunity had been given him by the Bishop of being confronted with his accusers, who were unknown to him at that time; the
[130] Bishop having refused to communicate to him their names; so as to enable him to answer their charges by himself, and his witnesses to be examined before the Bishop, at a time and place appointed by the latter for that purpose; and of obtaining from him a distinct statement of the ground on which his judgment of disapprobation had proceeded: for after the objection of having preached against infant baptism was, as Dr. *Povah* supposed, answered to the satisfaction of the Bishop, it was brought forward again. The Court will enforce even a visitor, whose judgment, though wrong, cannot be questioned, to convene the parties before him, and hear them (*a*). Secondly, they contended, that this Court has a controlling power to compel the Bishop to license one who was duly elected to an endowed lectureship, unless he can shew a reasonable cause for his refusal: and that the Bishop in this case had not disclosed any such cause; for that it is not sufficient for him to state generally the unfitness of the applicant of whom he did not approve, without shewing to the court, when called upon, the grounds upon which he judged him

(*a*) *Rex* v. *The Bishop of Ely*, 2 *Term Rep.* 336.

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unfit. It is not required of the Court to usurp the jurisdiction of the Bishop as to the competency of the candidate in matters within his peculiar province to decide upon; but to enforce the due exercise of the jurisdiction given to the Bishop: and therefore no objection can arise on the form of the licence. If the mandamus should go, and the Bishop should return for the cause of his rejection, that Dr. *Povah* had preached against infant baptism, the question to be tried by the jury will not be whether Dr. *Povah* was or was not a fit person to be licensed, but whether he [131] had in fact preached such doctrine; and of that fact the jury are as competent to judge upon the evidence as the Bishop himself. There is also a distinction, they said, between a rejection for unfitness in respect of learning generally, or ecclesiastical learning, and in respect of immorality: the truth of any charge of the latter description is as well triable by a jury as by the ecclesiastical judge. But whatever the reasons for rejection were, and however the Bishop might have exercised his judgment after a sufficient hearing, they still contended that he was bound to state those reasons to the Court, in order that the Court may judge of their application and adequacy: for the cases already referred to shew that if the Bishop refuse the licence arbitrarily and capriciously, and without reasonable cause, the Court will grant the mandamus in a case like the present, where the party has no other legal remedy for the interruption of his temporal right. Such was the opinion of Lord *Holt* in the case of this very lectureship (*a*); of Lord C. J. *Lee* in the case of the Bishop of *London* (*b*); of *Powell*, J. in *Colefatt* v. *Newcomb* (*c*); and of Lord *Mansfield* in *Rex* v. *Blooer* (*d*). It follows from these and other authorities, that the Bishop must shew the cause of his refusal, and that this Court must judge of it. There is no doubt that the Bishop has discretionary power to judge of personal fitness in matters altogether of a spiritual nature, such as the conferring of holy orders; because there is no secular benefit necessarily connected with them: but as soon as any secular question arises in connection with that character, the cognizance of the common law courts attaches, and they will take care that the temporal [132] benefit conferred by choice or election on the clerk is not intercepted by the Bishop's withholding his institution or licence, as the case may be, without a sufficient cause. Lord *Coke*, in 2 *Inst.* 632., commenting upon the stat. 9 *Ed.* 2. *st.* 1. *c.* 13., says, that it is required by law that the person presented to a benefice be

(*a*) Cited in 13 *East*, 421.
(*b*) Cited *ib.* 420. and 1 *Wils.* 11. 15.
(*c*) 2 *Ld. Ray.* 1206.
(*d*) 2 *Burr.* 1045.

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idonea persona, and that the examination of the ability and sufficiency of the person presented belongs to the Bishop, and that of this he is the judge and not a minister, &c. "But," he adds, "that in a Quare impedit brought against the Bishop for refusal of the clerk, *he must shew the cause of his refusal specially and directly*, for whether the cause thereof be *spiritual* or *temporal*, the examination concludes not the plaintiff; to the intent the Court, being the judges of the principal cause, may consult with learned men in that profession, and resolve whether the cause be just or no." and *Specot*'s case (*a*) is full to the same purpose; where in Quare impedit, it was held no sufficient cause for the Bishop to plead generally that he rejected the patron's clerk for inveterate schism, without shewing what it was; any more than if he had rejected him as non idoneus or criminosus generally, which would have been clearly bad. They referred also to classes of cases where the Court had interfered for the same purpose, by rules to shew cause upon writs of mandamus, in the several instances of school-
[133] masters (*b*), perpetual curates (*c*), and lecturers (*d*). They observed, that the 77th canon of 1603, as to schoolmasters, provides that none shall teach but such as shall be *allowed* by the Bishop, being found meet as well for his learning and dexterity as for sober and honest conversation, &c.: and by the 11th section of the act of uniformity, they are not to teach before *licence obtained*. That this provision is in substance the same as that for lecturers by the 19th section, requiring them to be *approved* and licensed; for the licence itself contains the *approbation* of the Bishop. That perpetual curates are regulated by the 48th canon, which provides that they shall not be permitted to serve "without *examination and admission* of the Bishop, &c. *having respect* to the greatness of the cure and meetness of the party." Yet Lord *Mansfield*, in *the King* v. *Blooer*, said that if the Bishop had refused without a cause, the party might have had a mandamus. In one of the cases (*e*), the Bishop of *Litchfield* and *Coventry* returned the special reasons for his refusal to license a schoolmaster, which

(*a*) 5 *Rep.* 57.

(*b*) *Rex* v. *The Bishop of Litchfield and Coventry*, 2 *Stra.* 1023. and 2 *Barnard.* 365. 428. and *Rex* v. *The Archbishop of York*, 6 *Term Rep.* 388. 490. See the statement of this case in the judgment of Lord *Ellenborough*, post.

(*c*) *Rex* v. *Bishop of Oxford*, 7 *East*, 345. 600. *Rex* v. *Blooer*, 2 *Burr.* 1045. and *Rex* v. *The Marquis of Stafford and Giffard*, 3 *Term Rep.* 646.

(*d*) *Rex* v. *Bishop of London*, 1 *Wils.* 11. 15. 13 *East*, 420. *Rex* v. *Churchwardens of St. Bartholomew*, *ib.* 421. *Rex* v. *Field and others*, 1 *Term Rep.* 331. 4 *Term Rep.* 125. and *Rex* v. *The Bishop of Exeter*, 2 *East*, 462.

(*e*) 2 *Stra.* 1023. 2 *Barnard.* 365. 428.

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were allowed by the Court to be sufficient. [Lord *Ellenborough*, C. J. observed that a Bishop choosing to make a special return did not shew that he was bound to do so. *Bayley*, J. The return only stated that there was a certain complaint exhibited against the party to the Bishop, which he was proceeding to examine.] The like was done by the Archbishop of *York* in a more recent case (*a*); and there the rule for the mandamus was made absolute in the first instance. And in the case of *The King* v. *The Marquis of Stafford and Giffard* (*b*), which was a mandamus to the lords of the manor of *Stowe Heath*, to allow and present to the ordinary for a licence a clerk who was elected by the inhabitants to an endowed curacy; the Court, in answer to an objection to the writ, that though the patrons could not reject him arbitrarily, yet that they might for such a cause as would warrant a Bishop in rejecting a clerk presented to a benefice, said that the defendants, in executing their trust, were to exercise a proper discretion, and to judge whether the party was or was not idoneus, as a Bishop may do in the case of a presentative, &c. But they took the distinction between fitness in learning, of which the Bishop was the sole judge, and moral fitness, which was properly determinable by a jury. But to whatever extent the Bishop acts *judicially* in granting or refusing a licence to a lecturer, they argued that ex vi termini he must proceed as other judges do, that is by convening the parties before him, and hearing them and their witnesses before he decides; and in all the cases it is laid down by the Court, that where there is no other specific legal remedy to enforce a right, the Court will interfere by mandamus.

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Lord ELLENBOROUGH, C. J. said it was then too late in the day to proceed further in the case; but the Court would devote their immediate attention to the affidavits before them. And the next day his lordship proceeded to give their opinion upon the whole case.—I have availed myself of the opportunity, which has been afforded me since the Court rose, of looking minutely through the whole of the affidavits which were the subject of comment during so many hours yesterday; and as it may be convenient that the decision of the Court should not be longer delayed in a matter which has been depending some time, and has occupied a considerable portion of attention, I proceed to state, in concurrence with my Brothers, the result of our opinion upon those affidavits, and the arguments that we have heard upon them.

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The duty which is in this case cast by law upon the Bishop is

(*a*) 6 *Term Rep.* 388. 490. (*b*) 3 *Term Rep.* 646.

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constituted by an act of the 13th and 14th of *Car.* 2. *c.* 4. the act of uniformity, which in the 19th section contains these words: " be it enacted, that no person shall be received as a lecturer, or permitted, suffered, or allowed to preach as a lecturer, or to preach or read any sermon or lecture in any church, chapel, or other place of public worship within this realm of *England*, or the dominion of *Wales*, and town of *Berwick-upon-Tweed*, unless he be first *approved* and *thereunto licensed* by the Archbishop of the province, or Bishop of the diocese," &c. The question of construction arising upon these words is what is the *approval* which the Bishop is to bestow upon the party, and upon what ground he is required to grant his license to him? It is a condition precedent that the Bishop should *first approve;* " unless the person be *first approved;*" and without that, he cannot lawfully exercise the function in question. It has been endeavoured in argument to liken the situation of a lecturer in all respects to the office to which a person is admitted by the institution of the Bishop in the case of an ecclesiastical benefice, and to the cases of curates and schoolmasters; in respect of which latter appointments, there are particular provisions which certainly do not apply to the case now before the Court. There have been many dicta of judges cited, from none of which am I prepared to differ, or to deny to any of them their proper weight and authority; the result of them is in effect this, that this Court, in the exercise of its authority to grant the writ of mandamus, will render it as far as it can the suppletory means of substantial justice in every case where there is no other specific legal remedy for a legal right; and will provide as effectually as it can that others exercise their duty wherever the subject-matter is properly within its controul. The right of the Court to apply these means for the attainment of such an end, and to prevent that defect of legal justice which might otherwise ensue, has been in general admitted: and if the Bishop had not in this case *inquired*, so as to enable himself to give a considerate approbation or refusal on the subject, it might have been a fit case for the interference of the Court to further such inquiry.

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The affidavits originally laid before the Court stated that the Bishop had objected first of all upon the ground that Dr. *Povah* had only deacon's orders, and had not obtained priest's orders; which latter description of orders he thought essential to his duly filling the office of lecturer. But this objection of the Bishop's was afterwards in fact removed by the applicant's obtaining priest's orders from the Bishop of *Sodor* and *Man:* upon the manner and circumstances of obtaining which I make no comment.

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The Bishop of *London* however did not, upon the removal of that, resort to any new ground of objection to which he had not adverted before; for it will be recollected that very early in the application to him, he had stated an objection to Dr. *Povah* on the ground of his having maintained opinions contrary * to the doctrine of the church of *England* in regard to infant baptism. But it seemed (at least according to the first view of the original affidavits) to be a little doubtful upon what gound the Bishop had refused his approbation; so that it might be to a degree questionable whether he had given that deliberate refusal, and exercised that considerate judgment in the act of refusing, which it would be required of him to exercise upon a subject in which the rights of others were so materially involved: the Court therefore granted a rule to shew cause, which has produced a distinct answer from the Bishop in his first affidavit, and a still more full answer in his last affidavit; in the first of which he states the ground of his refusal in these terms: "That his sole reason for refusing to license the Rev. *Richard Povah* to the *Friday* lectureship at the church of *St. Bartholomew, Exchange,* is a *conscientious opinion and conviction,* arising from every circumstance which, *after diligent inquiry,* he has been able to learn concerning the said *Richard Povah*'s conduct and ministry as a clergyman, *that he cannot, consistently with his duty as Bishop of* London *approve of him as a fit person* for such lectureship. That through the whole course of this transaction he has acted according to the best of his judgment, merely from a sense of the duty imposed upon him by his office, to approve of no one whom he did not in his conscience think to be a fit person." And in his subsequent affidavit, in answer to the additional affidavits that were last filed on the part of Dr. *Povah,* he has stated, "That the said *Richard Povah* had been repeatedly admitted before this deponent with a view to his being approved and licensed by this deponent to preach the *Friday* morning lecture at *St. Bartholomew, Exchange, London;* and that he has made diligent inquiry respecting the conduct and ministry of the said *Richard Povah* as a clergyman; and that being convinced from such inquiry that the said *Richard Povah is not a fit person to be permitted and allowed to preach the said lecture,* he hath conscientiously, and according to the duty of his office as Bishop of *London,* and for no other motive or reason whatever, *decided* and *determined,* after the said *Richard Povah* had been so admitted before him as aforesaid, and *after having heard him,* that *he cannot approve or* license him thereunto. And this deponent saith, that such *decision was formed* by him, and is still adhered to upon a *full and deliberate considera-*

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tion of all the circumstances he has been able to learn respecting the said *Richard Povah;* and that in forming such decision, and through the whole of this transaction, he has acted according to the best of his judgment, and from a conviction that the duty imposed upon him by his office requires that he shall not approve of or license any one to a lectureship whom he does not in his conscience believe to be a fit person to fill the office." Now if, instead of these matters being disclosed as they are in the Bishop's affidavits in answer to the rule, the Court had granted the mandamus, and the same matters had been returned to the writ, would not such a return have been conclusive upon the point? Unquestionably it would, unless the Court were prepared to decide that the function of approbation is vested in them, and not in the Bishop; and that notwithstanding the conscientious judgment which upon a full and deliberate consideration of the subject he has come to, and his declared conviction that he would be acting in a manner wholly inconsistent with the duties of his episcopal function, and the trust reposed in him by the legislature,

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if he did license him, we should nevertheless grant a mandamus to the Bishop to say—approve, though you do not approve; take our conscience to guide you, and not your own. There is no instance of such an application for a mandamus to compel a Bishop to *approve:* we can only compel him to *inquire:* we cannot devest him of that function which the legislature has for wise purposes vested in him, and transfer it to ourselves: all that the Court can ever do is to see that that function is well exercised by him in whom it is so vested; and there never yet has been an instance of a mandamus to compel a Bishop to approve and license a lecturer, where the question turned on the approbation or disapprobation of the Bishop as to the fitness of the applicant. The cases of mandamus which were cited yesterday, (and I believe all were then cited that are to be found in the books, and most of them were already referred to in Mr. *East*'s report of this case when it formerly came before us,) are for the most part such where the objection arose upon the part of the rector or vicar to the use of his pulpit, or where some other objection arose from another quarter than the Bishop himself, and where the Bishop was not, if I may so say, individually and per se the object of the application, nor a substantive party to it; but the applicants were obliged to adopt the mode of moving for a mandamus to the Bishop to license, in order to get at the question of right contested between them and others, and the Bishop was obliged pro formâ to be made a litigant party before the Court for such purpose. But the

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Court has never yet been called upon to act, nor in any instance hitherto has attempted to act, authoritatively upon the conscience of the Bishop, where his judgment appeared to them to be formed upon the personal qualification * of the party, after full inquiry, and where his refusal stood upon the distinct and clearly exhibited ground of a conscience so informed.

It has been urged, however, (and much stress was laid upon it in the argument,) that it was the duty of the Bishop to have instituted his inquiry upon the subject, in the manner and by the means usually adopted in courts of law, that is, by the formal production of the charges made against the applicant in a judicial course, and by a public and solemn hearing of the several parties, their proofs, and witnesses. But in the first place, what power has the Bishop to compel the attendance of parties and witnesses? what power has he to administer an oath? or what word is there in the act of parliament that prescribes the mode by which he shall attain a conscientious satisfaction on the subject? It only requires him first to *approve*, that is, before he licenses; and in so doing, it virtually requires him to exercise his conscience duly informed upon the subject; to do which he must duly, impartially, and effectually inquire, examine, deliberate, and decide. If the Court have reason to think that any thing is defectively done in this respect, it will interpose its authoritative admonition. The mandamus to license, if the party shall be found to be a fit person, is a solemn and peremptory call upon the Bishop to adopt the requisite means for duly informing his conscience, in order to the correct and effectual exercise of this most important duty.

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A strict analogy does not hold between the means of obtaining a license for a lectureship, and the other situations in the church to which it has been compared: Nor is a lectureship in point of right like the case of a temporal inheritance in an advowson or the like, where the patron is entitled to call upon the ordinary to institute his clerk, and to enforce that right by Quare impedit, unless the Bishop specifically states in his plea some reasonable cause wherefore the clerk presented is not fit. In the statute of articuli cleri, which is not merely an enacting statute, but, as Lord Coke says, declaratory of the common law and custom of the realm, the 13th chapter runs thus: "Also it is desired that spiritual persons whom our lord the king doth present unto benefices of the church (if the Bishop will not admit them either for lack of learning, or for other reasonable cause,) may not be under the examination of lay persons in the cases aforesaid, as it is in these times in fact attempted, contrary to canonical decrees; but

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that they may sue to an ecclesiastical judge, to whom it of right belongs, for the obtaining remedy as may be just." The answer is, "Of the *fitness* of a parson presented to an ecclesiastical benefice, the *examination*,"—(it will be recollected, that "*examination*" is not the term in the st. 13 & 14 *Car.* 2. but *approved*; and the word *examination* taken strictly, may be understood to mean a personal oral examination, such as usually takes place for the ascertaining a competence in literature,)—"the examination," it says, "belongs to the ecclesiastical judge; and so it has heretofore been used and shall be so in future." This statute relates in express terms to the case of ecclesiastical benefices properly so called; and there I admit that the Bishop must, if questioned for refusing institution to a clerk presented to him in a suit of Quare impedit, in his plea state the cause of such his refusal. But is there any thing in the act of the 13 & 14 *Car.* 2. which requires the Bishop formally to examine the person nominated to a lectureship
[142] either in the popular or any other sense of that word. Has any contemporary or subsequent practice put this interpretation upon the act? Does any canon require it? Or in the absence of all these, do public convenience and natural justice require him, in the event of his not approving a particular person to fill the office of lecturer, to state the grounds upon which he is induced not to approve such person? The office of lecturer, let it be recollected, is always engrafted upon some already subsisting ecclesiastical establishment, and where (if I may so say) the spiritual wants of the parish are already in part if not wholly supplied, by there being antecedently some person appointed to perform the rites and service of the church. And indeed where a new institution of this kind was to be superinduced upon the old and pre-existing foundations of the church, it became perhaps the wisdom, it certainly was congenial with the jealousy of the times in which this statute was passed, which were recently after the civil and political troubles, and the contentions on matters of religion, by which the country had been agitated, to provide that where a lecturer was to be admitted into any church or chapel, the Bishop should be satisfied that he was a person to whom the lecturing and teaching of the congregation could be safely committed. And therefore the analogy does not hold to the cases I have put arising upon the statute of articuli cleri, and the institution of clerks to regular benefices; as to which, and the degree of idoneity, (if I may so call it,) which may be required by the Bishop, or non idoneity which may excuse him in his refusal of a clerk presented, there has certainly been much legal controversy. In *Specot's* case it is decided

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that it is not allowable to plead generally that the clerk presented * is an inveterate schismatic. That case was much discussed, and there was great debate among the Judges whether a plea pleaded in this generality were good or not. I think the Judges were equally divided in the Common Pleas; upon which the opinion of the other Judges was taken, when the greater part decided that it was not a good plea; and this judgment was afterwards affirmed in the King's Bench, upon a writ of error; and it was held, according to the report of the case in 5 *Co.* 58. (and which is also reported in *Anderson* 189, and 3 *Leonard* 198.) that the cause of the schism or heresy, for which the presentee is refused, ought to be alleged in certain, to the intent that the King's Court may consult with divines whether it be schism or no; and if the party be dead, thereupon to direct the jury to try it: but if it be traversed, and the party refused be alive, it shall be tried by the metropolitan. The authority which belongs to *Specot*'s case has been certainly questioned, or, as the *Attorney-General* said yesterday, it has been a good deal shaken by the case of *Hele* v. *The Bishop of Exeter and Others*, in *Show. Parl. Cas.* 88. It was there maintained that it was a good plea on the part of the Bishop, that the presentee was minus sufficiens in literaturâ, without stating in what particulars. It was contended that he should state in what respects he was minus sufficiens, &c.; because in case of the death of the party it could not be tried by the Archbishop, but must be tried by the jury. It is so laid down certainly in the books; but a trial of that sort has never occurred in our times, nor is there any instance of it, that I am aware of, to be found in our books: and if such a case should happen, it does not occur to me how such a trial could conveniently proceed. Suppose a jury of twelve farmers collected in the jury-box, addressing themselves to try the literature of a departed person: how are they to set about it? are they to try it by evidence of his reputation for literature generally? or are they to try it by the particular documents in proof of his literature, which he may have left in the shape of *Latin* or *Greek* exercises, produced upon his examination before the Bishop, and upon which the Bishop pronounced at the time when he refused to institute him? It would be somewhat strange to present to the grave attention of such a pannel the translation which the deceased may have made from some part of the sacred writings in the *Greek* tongue, or his *Latin* composition upon a theme which may have been handed to him by the Bishop; to hear counsel haranguing them upon topics of grammatical construction or verbal criticism, and to see them assisted by a Judge, (who possibly may not himself

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be very deeply learned in the dead languages,) addressing their minds to try whether some learned Bishop is right in the judgment he has formed upon the same materials, and sitting as a court of error from him in matters of grammar. I wish that the law-books, which tell us that it belongs to a Judge and jury to decide such points, had at the same time instructed us how we are adequately to perform the task. As no case has been referred to as having yet happened, so I hope none will ever arise; for however well constituted we may be for other purposes, every body must see that a very imperfect and blind execution of duty must take place, if the trial of literature were committed to such a tribunal. I merely advert to these, as topics presented by the large discussion of yesterday, by the mention of *Specot*'s
[145] case, and that of *Hele* v. *The Bishop of Exeter*, which last was however, I think, very briefly adverted to. The other case to which a lectureship has been likened is that of a perpetual curacy. There, unless the curacy, by being augmented by queen *Anne*'s bounty or otherwise, becomes a presentable benefice, for which a Quare impedit lies, the only legal remedy which the curate has is by mandamus. But here I would refer to the canons for the authority and duty of the Bishop in respect to curates; and to the statute, in respect to lecturers; to shew the difference between the two cases. By the forty-eighth canon, "No curate or minister shall be permitted to serve in any place *without examination and admission of the Bishop of the diocese* or ordinary," &c. It appears then that there is to be an *examination* by the Bishop, which is to precede the admission of the curate; which duty of examination is cast upon him by the express terms of the canon; and therefore if the Bishop either will not examine at all, or only in a mode altogether ineffectual for the purpose for which such an examination is required; if in short he should appear to refuse or elude the performance of this express duty, the Court will interfere by mandamus to compel such an examination to be made as appertains to his duty. But in this case it will be recollected that *examination* (which may be understood to be such as takes place in cases of institution to benefices) is expressly enjoined by the canon. So with respect to schoolmasters, in the seventy-seventh canon it is said, "No man shall teach either in public school or private house but such as shall be allowed by the Bishop of the diocese or ordinary of the place, under his hand and seal, *being found meet*, as well for his learning and dexterity in
[146] teaching, as for sober and honest conversation, and also, for right understanding of God's true religion." Here the duty of exami-

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nation is again pointed out: the Bishop is to find whether he is learned, capable of teaching, moral, and of a right understanding in religion: and therefore the Court would require of him that he should institute some proper mode of examination by which the learning, dexterity in teaching, morals, and true religion of the candidate may be ascertained. But in the instance of the lecturer, the term *approbation* in the stat. 13 and 14 *Car.* 2. is quite another thing: what scales have we to weigh the conscience of the Bishop? And how are we to know whether he properly or improperly disapproves? May he not properly disapprove of the candidate for a lecturer's licence on account of many matters which cannot be conveniently stated to a court of justice? May he not disapprove for matters within his own personal observation and knowledge: for the habits of life and conversation of the person, which might be known to him from residing in the same university or society with him; from his conduct in life down perhaps to the very time when the Bishop is called upon to signify his approbation? Is he to exclude his own knowledge, the most material of any? Does the law say upon what proof he is to act, or that he is to have witnesses upon oath to the facts by which his judgment is to be guided? What authority has he to compel the attendance of witnesses before him? The word of the statute is *approve;* and he must exercise that approbation according to his conscience, upon such means of information as he can obtain; and every thing that can properly minister to his conscientious approbation or disapprobation, and fairly and reasonably induce his conclusion on such a subject, though it might not be evidence that would be formally admitted in a court of law, may, I am of opinion, be fitly taken into his consideration. [147]

The case of the mandamus to the Archbishop of *York* in the instance of a schoolmaster was also referred to in the argument, and it was stated that the rule for the mandamus had been absolute in the first instance. I inquired of the clerks in the crown office, and find that that statement is not correct. What is stated to me by them, and which is confirmed by my own recollection, having been counsel in the cause both here and below, is that the mandamus was applied for to the Archbishop to license *Withnell*, one of the candidates; there being a contest between the electors whether *Withnell* or *Gartham* was well elected. The Court enlarged the rule till it should be tried in an issue which of them was duly elected. The result was in favour of *Withnell.* And there the Archbishop having been made a party pro formâ in the first instance, the Court, after the trial of the issue, made the

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rule absolute for him to license *Withnell;* not anticipating any objection of this sort against the licensing on the part of the Archbishop. For the Archbishop had not made himself a party in the question of right, nor had, I think, appeared by counsel or otherwise when the rule to shew cause was first discussed, and therefore had no opportunity of notifying his objection at the time. The affidavits laid before the Court in the first instance merely repected the question of election: nothing more was before the Court than whether *A.* or *B.* was duly elected by the vicar and churchwardens of the parish of *Shipton*, to the number of eleven, I think; and the Archbishop was not contemplated as a party, except in point of form, and merely as the person to whom the mandamus to license, in order [148] to give effect to the election, must be directed. But when the writ was at last delivered to him, upon discovering the entire literary insufficiency of the applicant, he made his stand, and returned the fact to the mandamus. And this Court afterwards held such return to be conclusive, and bestowed much commendation upon the Archbishop for resisting the appointment of a person not qualified in point of literature to be the teacher of an endowed public school, which by the increase of its revenues had become of considerable annual value, and in return for which it was thought that a competent proportion of learning was fairly to be expected. There was one peculiarity in the argument in that case: it was said that the canon I have alluded to was not properly binding on the Archbishop of *York*, as the canons of 1603 did not extend to the province of *York;* but that the duty arose upon the statute of *Elizabeth*, and other statutes (*a*): but if that were so, it would make only a shade of difference as to the source and limits of that authority which the ordinary universally has in respect to the licensing of schoolmasters, and which is recognized by several statutes. Another case was pressed upon us yesterday, which I thought, upon my recollection of it at the time, had little to do with the present question; that was the case of *The King* v. *The Marquis of Stafford* and *Giffard*. In the first place, that was not an application against an ecclesiastical person, and therefore the duty of the Bishop as ordinary to inquire and approve could not come judicially in question: the only question was as to the duty of trustees, (for such were the Marquis of *Stafford* and Mr. *Giffard*,) [149] under a trust for the presentation of a clerk to be licensed by the

(*a*) 23 *Eliz. c.* 1. *s.* 6. 2 *Jac.* 1. *c.* 4. *s.* 9. and 13 & 14 *Car.* 2. *c.* 4. *s.* 11.

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ordinary to be stipendiary curate of the chapel of *Willenhall*, who, after being nominated by the inhabitants of *Willenhall*, was to be *presented and allowed* by the lord of the manor of *Stowe Heath*. The joint lords of the manor of *Stowe Heath* at that time being the Marquis of *Stafford* and Mr. *Giffard*, they had refused to allow and present one *William Moreton*, nominated by a majority of the inhabitants of *Willenhall*, on the ground of his being notoriously a drunken and immoral person. The Court, it appears, at first thought that the mandamus should go, as it might be too much to determine the question upon affidavits as to the right of the defendants to approve or reject. But the Court afterwards wholly retracted that opinion, and refused the rule. What is said by *the Court* afterwards, (for Lord *Kenyon* is not reported as having said any thing of himself distinctly from the rest of the Court on this part of the case,) is this; "If the defendants were to be considered as trustees, in executing that trust they were to exercise a proper discretion, and to judge whether the party were or were not idoneus as a *Bishop may do*" (what is said about what a *Bishop may do* is merely by way of illustration of the argument, and is not the point in judgment, and is so far extra-judicial,) "in the case of a presentative benefice, and might absolutely reject the nominee on account of his being illiterate; which question of fitness *could not* be tried by a jury, and of which he was the sole judge:" (It may however be tried by a jury in the case put, of the clerk's dying, as the law-books say: as to the convenience of which trial I have observed already:) "but that as Mr. *Moreton*" (here the Court having done with every thing which respects the authority or duty of a Bishop, come to the facts of the case [150] before them,) "had been rejected on account of immorality and indecent conduct, that question might be properly determined by a jury of his country, to whom he had a right to appeal on the truth of the facts alleged against him. If however those facts were true, the defendants might return them upon the record." All that the Court therefore say is this; supposing this to be a case in which a mandamus might go, the Marquis of *Stafford* and Mr. *Giffard* might return the fact; and if that return were not true, an action might be brought for a false return. But those were not ecclesiastical persons; nor does that case, which merely respected the duty of trustees with reference to their cestuique trusts, apply to the present. I should have thought indeed that the words *present and allow* merely imported a duty in the trustees to present the person whose election they allowed or ought to allow as regular, and no more. At last the Court thought it a

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case of a trust in which they had no right to interfere: that the mandamus was only a legal remedy, a remedy for the legal right where there was no other legal remedy; that if it were an equitable right this Court would not interfere; and if a legal one, there was a specific legal remedy by Quare impedit.

Many other cases were mentioned, one of which was the *King* v. *Blooer*. That was the case of a curacy: the application was for a mandamus to a parishioner and an inhabitant of a chapelry, to restore a curate whom he had forcibly turned and kept out of his chapel. No rights or dues of the ordinary, as such, were in question in that case; but Lord *Mansfield* appears to have said, "If the Bishop had refused *without cause* to license him, he
[151] might have had a mandamus to compel the ordinary to grant him a licence." And indeed as it is the party's only remedy, if the licence be refused *without a cause:* the Bishop being to act there as in the case of an institution, if he causelessly refused the licence, the Court would grant the mandamus: and if the Bishop either could not or would not assign any cause, he might be compelled to admit him. But how is that argument to be extended to a case where the Bishop assigns the only cause of rejection which the statute requires to exist, namely, his *disapprobation* of the person applying; and where he satisfies the Court by the most explicit and solemn declaration, that this disapprobation is the result of deliberate inquiry and conscientious judgment.

If we look at the facts in this case, it appears that the Bishop, having certainly assigned at one time a ground which has been removed, I mean the want of priest's orders, did early upon the application to him intimate an objection to granting the licence required, on account of the maintenance of doctrines, which he said were contrary (as they certainly are) to the doctrines of the Church of *England*. But he did that in this case, which it is very natural for liberal-minded persons to do; thinking that the applicant ought to be rejected, he wished to reject him upon the least obnoxious ground which could be assigned; and there was perhaps a degree of infirmity in this respect belonging to the nature of man, which disposes us to wish and endeavour to perform an act of duty in the least harsh and painful manner we can, as it respects the feelings of others. I must presume that the Bishop very early, though the precise time is not stated, knew of *Hall*'s letter: the letter was written in *November;* but when he knew it (for it went to his secretary) does not distinctly appear:
[152] the letter was written by Mr. *James Hall* to Dr. *Hall*, on the 24th *November* 1809; and the latter says that shortly after the writing

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of that letter he conveyed it to the Bishop's secretary. Now the Bishop's secretary might produce it very soon afterwards to the Bishop: and I think the fair inference from the whole is that before the first application for the licence, the Bishop had been apprized of this ground of objection to the applicant: but he rested first of all upon the want of priest's orders. [One of my brothers suggests that the expression used is that the secretary *reminded* the Bishop, after Dr. *Povah*'s application, of this letter.] The letter was sent at the time, not with any reference to this lectureship, for it was written on the 24th of *November*, 1809, and the lectureship did not become vacant till very shortly before the 20th of *March* 1810, when I observe the election took place; the intelligence conveyed by it to the secretary came therefore in a more credited and less suspicious form, as not having been written with a view to any depending question, nor consequently with a view to obstruct Dr. *Povah*'s access to this piece of preferment. The person who writes it states himself to have written to the curate of the parish, with a view to prevent the admission of that person into the pulpit of the parish, who he thought abused his opportunities there, by preaching to the congregation improper doctrines. This letter having been written, as I have stated in *November* 1809, four or five months before the election, it appears that it did not at the moment present itself to the mind of the Bishop, to whom in all probability (for so I must presume from the expression used) the secretary had before communicated it; but the secretary afterwards *reminded* him of it: and then the question is whether it did not become imperatively his duty, upon being so reminded, to resist the licensing of the person referred to, if he were satisfied of the truth of the facts intimated to him. Until the last affidavits were made it did not appear what information the Bishop had specifically upon this ground; he did not chuse to disclose it at the time of the application for the licence; and I do not blame him for the delicacy of not disclosing the names of the persons who had so informed him. The information now however and the names of those who gave it, are disclosed to the Court on oath. We have the affidavits of Doctor *Hall* and of Mr. *James Hall*, who both swear to Dr. *Povah*'s having preached those exceptionable doctrines: and there is in addition to this the affidavit of a person of the name of *Macgregor* to the same effect. Now if we were trying the validity and correctness of the Bishop's conclusions, and going into all the facts of the case, (which I disclaim our authority for doing) there was before the Bishop the evidence of a person who gives his

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information at an unsuspicious period, when there was no question depending and no interest to be served or prejudiced by it. There was the information of Mr. *James Hall*, a clergyman, and also that of Dr. *Hall*, the curate, (who though of the same name was no relation of his,) and there is since the confirmatory evidence of Mr. *Macgregor*. I admit that the Bishop had not *Macgregor*'s evidence before him at the time, but he had that of the two first named persons; and the question was whether he was to believe them, or several other persons present, who say that they did not hear any such things, and that they should have heard them if they had passed: thus negativing so far as they can the particular
[154] words and expressions imputed to Dr. *Povah*. The negative is not so strong on any occasion, and certainly not upon an occasion of this sort, as the affirmative; many things may pass in the course of a sermon which may not be afterwards distinctly recollected by persons present. I suppose hardly any person is so attentive an auditor of a sermon as to say with certainty, at some distance of time, whether this or that particular observation or expression may not possibly have formed a part of it. But laying the imperfections of memory out of the question, the class and situation in life in which some of these deponents are, one should think would not particularly prepare and dispose them to observe and to be struck with the application of certain expressions to the doctrines and tenets of the Church of *England* as propounded in its articles, Might not then the Bishop be in reasonable suspence, at least, to which description of relators he should give the fullest credit? He certainly might be, so far as we are enabled to judge upon the evidence before us: and if his belief at last preponderated in favour of the charge, are we warranted to condemn his judgment? The Bishop has never renounced this objection; he has never said that he did not believe this charge. The production of Dr. *Povah*'s notes was relied on yesterday, and it was said that the Bishop had, on seeing them, renounced this ground of objection, and had received perfect satisfaction upon it. But what was that satisfaction? Dr. *Povah* produced to him his short-hand notes of some sermon that he had preached, in which no such objection appeared. But how was that to satisfy the Bishop? It might have been a sermon upon a perfectly distinct subject from that of infant baptism; and the Bishop afterwards stated in his letter to him, that the charge arose from a sermon preached a month or two
[155] before. The Bishop did not renounce the objection, nor say that he was satisfied that Dr. *Povah* had not so preached: he only said, in effect, this particular sermon is not the one to which the state-

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ment in question is imputed. But we are trying this question now with evidence before us, by which the statement on the part of Dr. *Povah* is attempted to be confirmed by very extraordinary matter. It is said that he not only did not preach against infant baptism, but he upheld the necessity and importance of it; and so much so as to have (if I may use the expression) electrified the consciences of several of his congregation; one man of the name of *Hardy*, another of the name of *Pollard*, and another of the name of *Hart*; so as to have induced them to set about rectifying that error in their conduct which had taken place in not baptizing their children sooner: and that they in consequence immediately, or as soon as they conveniently could, set about the baptizing of their children. Now the investigation of the facts which has since taken place is very unfortunate for the credit of these assertions. *Hardy* we are to suppose to have been resident in this parish; for we are not told where else to look for the baptism of his child: but it turns out that he had no child baptized in this parish in the year 1809; these sermons being stated to have been preached in the autumn of 1809. The search has been prosecuted through the year 1808, (why through that year I do not understand,) and through 1809 and 1810; and he does not appear to have had any child baptized in either of those years. *Pollard*, who is supposed, by hearing this sermon, preached in the autumn of 1809, to have been so much struck with it, that he had felt a painful sense [156] of the neglect of this duty, lies by I think till the 31st of *March* 1811: that is, having heard this sermon which communicated the impulse to his conscience in the autumn of 1809, he does not baptize his child till the 31st of *March* 1811, and then he baptizes two together; the first of these children having been born two years and about ten days before; so long was the period which intervened before his strongly convinced conscience impelled him to perform this necessary right. *Hart* baptized his children upon the 5th of *May* 1811, which children had been born the first of *August* 1809, and the second on the 30th of *March* 1811; he had lain by therefore one year and nine months after the birth of the first child, being the whole portion of time which elapsed between *August* 1809, and the 5th day of *May* 1811, when he brought them to be baptized. Now I put it to the plain common sense of any man, if this cause had come before a court sitting at nisi prius, how would such evidence have been received, and what regard would it have been entitled to? Can any one say that this lingering performance of a rite, of the importance of which the parties are supposed to have been so powerfully convinced, took place under

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an impulse which operated upon the conscience of his hearers for the first time effectually after a lapse of fourteen or fifteen months. If that be not probable, does it not give its complexion and character to the whole of the evidence produced on this head, and warrant an opinion that the Bishop might more safely and fully rely upon the testimony of the particular persons on whose evidence he appears to have rested, as to the fact of Dr. *Povah*'s having propounded doctrines which were of the exceptionable nature described by them, than upon that of hearers of the description I have commented upon.

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This would be the conclusion we might arrive at if we were trying that particular fact; but the bishop does not in his affidavit rest upon that, or upon any other single ground of objection; but makes this general allegation, (which, if made in a return to the mandamus, would be as conclusive as any that could be made,) that he thinks the said *Richard Povah* unfit, and therefore cannot approve or license him. Unless therefore the Court feels itself at liberty, in a case in which the legislature has thought fit for reasons satisfactory to itself in point of wisdom and convenience, to vest the right of *approval* in the ordinary, to supersede that provision; and, not content with seeing that he exercises a mature, deliberate and conscientious judgment upon the subject, to require of him to state to the Court all the grounds and materials upon which that judgment was formed; all the evidence by which it was influenced and directed; and to place ourselves in the situation where the statute has placed the Bishop, as to the final approbation or disapprobation of the party applying; unless we thus enlarge the limits and sphere of our jurisdiction, I say we cannot impugn the decision he has solemnly come to, or the disapprobation which he has upon his oath recorded upon the files of the Court. It seems to me, therefore, that unless we repeal the act of parliament, and violate the functions that are exclusively vested in the Bishop and others under the act, we cannot grant the mandamus that is prayed for; and that, in refusing it, we contravene no principle of law that has ever been established, nor run counter to any one dictum of any one Judge pronounced in any cause in which a question of this nature, respecting the exercise of the functions of a Bishop, has ever occurred before the Court.

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The rule has two parts; the one respecting the Bishop, the other the Archbishop. Respecting the Archbishop, I have no doubt that, as provincial and metropolitan, he has a function to exercise upon this subject. My reason for saying so is because the act appears to me to have distinctly said so. I do not say that

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The KING *against* The Archbishop of CANTERBURY and the Bishop of LONDON.

the application should go in inverso ordine, i. e. to the Archbishop in the first instance, and afterwards to the Bishop; or that it is to go from the one to the other in the nature of an appeal; but I think it is competent to the party, if he please, to apply to the Archbishop as well as to the Bishop for the licence. The answer which has been given is that the instances that have occurred, to the knowledge of the Archbishop's officers, have been only in cases within the Archbishop's own peculiar diocese; which he has distinct from his provincial jurisdiction. But that he has exercised the function only in those instances merely proves that such applications only have been made; it does not prove negatively that which would have appeared if there had been applications actually made to him for his interference from others within his province at large, and rejected; *viz.* a refusal of his interference, and an acquiescence (if nothing appeared to the contrary) in that refusal; but there is no such instance. Considering, however, that it was in a late stage of the business that the Archbishop was introduced at all into this rule; and not being satisfied that it is right to complicate in the same rule the question of a mandamus to the Bishop, and to the Archbishop, in the sort of alternative [159] mode which is held out in the terms of this rule; and as the question is quite a new one as it respects the Archbishop; I think if there be any application for a mandamus to be addressed to the Archbishop, that it ought to be a substantive application standing upon its own ground. I say this as a reason why this part of the rule as well as the other, ought to be discharged.

Upon an application for costs, his lordship, (after referring to the case of *The King* v. *The Bishop of Chester*, 1 *Term Rep.* 396.) said that as this was a new case, the Court did not think it fit to give them; though on any future application of a similar sort, the Court would feel it to be their duty to do so.

Per Curiam, Rule discharged.

BINFIELD *against* MAXWELL (*a*).

Saturday, Feb. 8th.

The defendant, having given a bail-bond to the sheriff on his arrest, and been afterwards served with notice of declaration; if he do not plead in abatement for a misnomer within the four first days, the Court will not afterwards (though before pleading in chief) set aside the proceedings, upon motion, on the ground that he had been arrested and declared against by a wrong christian name.

A RULE was obtained by the defendant, calling on the plaintiff to shew cause why the process on which the defendant had

(*a*) Note of *M.* and *S.*

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been arrested, the bail-bond given thereon, and proceedings (if any) had against him, should not be set aside, on the ground that he had been arrested by the name of *James*, whereas his name was *John*.

Tuddy now shewed cause upon an affidavit, which stated that the notice of declaration was served on the 23d of *January* upon the defendant in the name of *James Maxwell*, and that this rule was not obtained until the 29th of *January*. He contended therefore that the party came too late with his objection, having suffered the time for pleading in abatement, in which mode he might have availed himself of the misnomer, to pass by; and that the Court would not give him the effect of such a plea by way of motion, where there was no doubt of the identity of the party. He cited the case of *Oakley* v. *Giles* (*a*).

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Marryat contrà, relied on *Wilks* v. *Lorck* (*b*), where other cases in this court subsequent to that of *Oakley* v. *Giles* were referred to: there the defendant was discharged on a similar application; and it was considered that a sheriff who arrested a defendant by a wrong name was a trespasser. [*Bayley*, J. There the application for his discharge was made before the time for pleading in abatement had expired. In *Cole* v. *Hindson* (*c*), the sheriff was only considered to be a trespasser in seizing the goods of the plaintiff under a wrong name, as it did not appear by the sheriff's plea of justification that the plaintiff had appeared and had omitted to plead the misnomer.]

Lord ELLENBOROUGH, C. J. The defendant might have pleaded in abatement within four days, but has omitted so to do; and there is no doubt that he is the person really intended to be sued.

Per Curiam, Rule discharged.

(*a*) 3 *East*, 167.

(*b*) 2 *Taunt.* 399. In addition to *Delaney* v. *Cannon*, 10 *East*, 328, *Shadgett* v. *Clipson*, 8 *East*, 328.; and *Dring* v. *Dickenson*, 11 *East*, 225, *there cited*, see *Clarke* v. *Baker*, 13 *East*, 273.

(*c*) 6 *Term Rep.* 234.

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KEEN *against* DORMAY.

Saturday, Feb. 8th.

THIS was an action of debt to recover penalties upon the stat. 5 *Eliz. c.* 4. for exercising the trade of a miller, not having served a seven years' apprenticeship thereto. The cause was tried before Lord *Ellenborough*, C. J. in *Surrey;* and the declaration stated that the defendant on the 13th of *June* 1810, at *Wandsworth* in *Surrey, did set up, use, and exercise the art, mystery or manual occupation* of a miller, and did use, exercise and continue the said art, mystery or occupation for twelve months then next following; the same being an art, mystery, or manual occupation used and exercised within the realm of *England* in the 5th of *Eliz.* &c.; when in fact the defendant was never educated or brought up in the said art, mystery, or manual occupation, nor served as an apprentice in the same for the space of seven years; against the form of the statute, &c.; whereby, &c. he hath forfeited 24*l.* (i. e.) 40*s.* a month for twelve months, during which time the defendant did use, exercise, and continue the said art, mystery, or occupation of a miller; and thereby an action hath accrued to the plaintiff, &c. who sues for the king and himself, &c. Another count charged the defendant with a special act of interference in the business of a miller, by setting and continuing a certain person to work in it; but this latter was not proved at the trial; the name of the workman having been mistaken; the question therefore rested on the general count. As to which, the evidence was shortly this.

Quære whether a person, not having served as apprentice to the trade of a miller, embarking his capital in a mill, which he superintends, and derives the profits of, through the agency of a foreman statutably qualified, to whom he gives directions as to the order in which the corn of the several customers shall be ground; but no otherwise interfering in the management, and never engaging in the *manual* exercise of the trade; be liable to the penalty given by the stat. 5 *Eliz. c.* 4. *s.* 31.?

The defendant, who had never before acted as a miller, nor had ever served an apprenticeship to the trade of a miller, took possession of a corn-mill at *Wandsworth*, in *September* 1809, (whether as a purchaser, or a renter, did not appear at the trial, though he was stated to have purchased it, and that fact was not now disputed;) and having himself no knowledge of the business, confided the whole manual exercise and conduct of it to his foreman, whom he engaged at weekly wages, and who had been regularly apprenticed for seven years to a miller; the defendant never interfering with his foreman in such his manual exercise and conduct of it further than giving him directions whose corn should be ground: and apprentices were bound to the foreman. His lordship at the trial made some general observations on the penal clause (*s.* 31.) of the act of *Elizabeth*, which he thought, according to the terms and fair construction of the whole act, was intended to be confined to

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persons employed in the manual exercise and occupation of the several trades mentioned in the act, being principally handicraft trades; and not to capitalists who merely embarked their capital, without personally interfering with the manual exercise of the trades. And he urged the improbability of supposing that the legislature could have intended to include persons of large landed inheritance, who in former times, and down to this day, were the owners of property of this description, to which the services of their tenants were attached; and observed that *John of Gaunt* held much property of this description in the North. Then, after bringing the facts of this case into review before the jury, and noticing the absence of any evidence that the defendant had ever interposed his own manual skill and management in the business, from whence the public might have suffered from his ignorance; his Lordship [163] finally left it to the jury to say whether, under all the circumstances, the defendant had in point of fact used or exercised the art, mystery or manual occupation of a miller, (not having served an apprenticeship to the trade,) according to the terms of the allegation in the declaration: and they found a verdict for the defendant.

Shepherd, Serjt. in the last term moved to set it aside as a verdict against law and evidence; relying upon *Hobbs qui tam* v. *Young* (*a*), where in an action of debt upon the statute (*b*) for using the trade of a clothworker, without having served an apprenticeship to it; though it was proved that the defendant only employed others to work; he was held liable. Here the defendant received all the profits, and superintended the accounts; and so far interfered with the actual management of the business as to direct whose corn should be ground.

Lord ELLENBOROUGH, C. J. stated the opinion which he had held at the trial upon the construction of the statute, as before mentioned, and the manner in which the case had been left to the jury; but said that he thought it was a fit question to be reconsidered. And the Court having granted a rule to shew cause, his lordship, after reporting the evidence, as above, with his opinion, which he still held, said that he was aware that the case of *Raynard* v. *Chase* (*c*), had been endeavoured to be distinguished from *Hobbs* v. *Young*, on the ground of the defendant's having only par-

(*a*) 2 *Salk.* 610. and 3 *Mod.* 315. and vide *Bull. N. P.* 193.
(*b*) 5 *Eliz. c.* 4. *s.* 31.
(*c*) 1 *Burr.* 1. 2 *Wils.* 40. *Bull. N. P.* 194.

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ticipated in the profit or loss with a qualified partner, who had the sole management* of the business; but as Mr. Serjt. *Williams* had judiciously observed in his note in 1 *Saunders* 312, a participation of profits with the acting manager of the business can make no difference in the question: and therefore his lordship considered the latter case as irreconcileable with the construction of the statute adopted in *Hobbs* v. *Young*.

Marryat and *Taddy* now shewed cause, and relied upon *Raynard* v. *Chase* (*a*), as not distinguishable in principle from the present; for that was not the case of a mere dormant partner, but of one in whose name jointly with the other the trade was carried on, and who shared in the surplus profits, after payment of a certain salary to the acting partner: and the main ground of the decision was that he had not interfered in the *manual* exercise of the business of the brewery, so that no customer could have been prejudiced by his want of personal skill; the only object intended to be secured by the statute. Here the defendant is charged with the *manual* exercise of the trade: of which there was no proof. But it is said that the word *manual* is only used in the excepting, and not in the prohibitory part of the clause. It is however the same in substance, and the whole must be construed together: the exercise of the manual occupation of the trade is of the essence of the description in the words of the statute, which has always received a politic construction adapted to the advancement of trade, where competent skill is in fact secured, though not within the letter of the act; and therefore though the only exception in terms be of those who have served a seven years' apprenticeship to the trade; yet it has been long settled that an exercise of it in fact for that period will qualify the party (*b*). So the widow of a qualified person may carry it on, though she had never interfered in the management of

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(*a*) 1 *Burr.* 1. 2 *Wils.* 40.

(*b*) *Wallen* v. *Holton*, in 1759. *Bull. N. P.* 193. I have an authentic note of that case, which is as follows: "20th of *June* 1760. The following question was proposed by Mr. Baron *Adams* to all the Judges at *Serjeant's Inn*, for their opinion, in a cause of *Wallen qui tam, &c.* v. *Holton*. Upon an information on the statute 5 *Eliz.* for exercising the trade of a baker, not having served as an apprentice for seven years; the case upon the evidence was that the defendant did exercise the said trade within the town of *Workingham* in *Berkshire*; and having so done for 12 years, he was then prosecuted upon the information. The question was whether such exercise of the trade, for 12 years unmolested, though it did not appear he had served as an apprentice, shall be an offence upon this prosecution. Whereupon the twelve Judges, having considered it, were unanimously of opinion, that following the trade seven years, without any prosecution in effect, is a sufficient qualification."

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it during her husband's life (*a*). Also executors may carry on trades for infants, &c. [*Le Blanc*, J. In those cases they are placed in the situation by act of law.] That may be so in the first instance and for a reasonable time, till they can call in the assets; but the protection has been extended to them in this respect beyond the line of necessity. A person who only lends his capital, and employs a person of competent skill, in the contemplation of the statute, to carry on a trade, could never have been intended to be punished as an offender. Lords of manors hold mills, at which the tenants are bound to grind their corn. In *Hobbs* v. *Young* (*b*) the defendant provided materials and paid the workmen: but here the defendant never interfered in the manual exercise or conduct of the business, but left that to his foreman.

Garrow, *Gurney*, and *Adolphus*, contrà. The defendant was to
[166] all intents and purposes as much a miller as any master of a trade, by whose capital and under whose control it is carried on, can be said to be a person setting up, using, or exercising that trade. Many masters in business interfere in the personal management of it still less than the defendant did; for though he did not work the mill himself, he directed whose corn should be ground. This is a personal interference in the business of the mill, if that be necessary. The word *manual* is only used in the excepting, but not in the prohibitory part of the clause. This is quite different from the case of landlords who let property of this description to their tenants: the tenants there carry on the trade, and derive the profits of it: the landlord only receives rent for the use of his realty. Here the defendant had either rented, or bought, or built the mill, for the express purpose of carrying on the trade of a miller himself: this it is which the statute prohibits a man from doing, without having first served an apprenticeship to the trade for 7 years; because the actual management of it requires skill as well as capital. It is no answer to say that he employed servants of competent statutable skill: so do all master tradesmen; but they are not the less tradesmen on that account. The trade of a miller is indeed classed with mere handicraft trades in the 30th section of the Act, and the 3d clause, which enumerates certain trades, amongst others that of a miller, is in terms confined to the retaining of servants in such trades (*c*);

(*a*) *Bull. N. P.* 193. Per *Holt*, C. J. in *Hopkins* (*Hobbs*) v. *Young*, cited by him in *Peaks* v. *Johnson*, *H.* 1 *Ann.* at *Westminster*.

(*b*) 2 *Salk.* 610, and 3 *Mod.* 315.

(*c*) It is also to be remarked that the title of the act is of the same limited description: "An act containing divers orders for artificers, labourers, servants of husbandry, and apprentices."

but the penalty for which this action is brought is given by the 31st section, which is not merely restrained to the manual exercise of those trades, but extends to such as *set up* and *occupy*, as well as to those who *use* and *exercise any* craft, mystery, or occupation then used or occupied. The distinction now attempted was also set up in *Hobbs* v. *Young* (*a*), and expressly overruled. [Lord *Ellenborough*, C. J. How can that decision be reconciled with the subsequent case of *Raynard* v. *Chase?* Lord *Mansfield* endeavoured indeed to reconcile his decision as much as he could with *Hobbs* v. *Young:* but I cannot see how they can well stand together. *Bayley*, J. One of the Judges differed from the rest in *Hobbs* v. *Young*.] His dissent seems to have been on other parts of the case. In *Raynard* v. *Chase*, Lord *Mansfield* admitted that the act of the servant must be taken to be the act of the master: and it must be confessed that the Court in deciding that case went a great way to get rid of the words of the statute; but they did not over-rule *Hobbs* v. *Young*, which is more consonant to the words of the act, and therefore is the surer guide, if the two decisions cannot be reconciled. Besides, in another case (*Beach* v. *Turner*) (*b*), which was an action against one for exercising the trade of a currier, without having served an apprenticeship; where he was held not to be within the statute, as serving one who was qualified; Lord *Mansfield* said that there was a great difference between setting up a trade, and working at it: that the act meant to prevent persons *setting up* trades, being themselves unqualified, *or* employing unqualified persons to conduct it; but not against qualified persons employing journeymen.

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Lord ELLENBOROUGH, C.J. Since the case of *Raynard* v. *Chase* it has been understood to be the rule of law, that if the party do not interfere in the manual occupations of the trade, but merely carry it on by the operation of other persons of competent skill, in the contemplation of the statute, he is not within the penalty of it. For though Lord *Mansfield*, in delivering his opinion in that case pretends to distinguish it from and to save the case of *Hobbs* v. *Young*, yet in truth those decisions are in direct opposition to each other in principle, and are so considered by subsequent commentators on the statute. Nothing surely can turn upon a party's taking only a moiety of the profits of the trade, if his engaging in it at all, though by the operations of skilful persons, be prohibited: such a circumstance cannot weigh in the construction of the act. This statute having been considered as against the general policy of the realm, has always received a restrictive construction in *West-*

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(*a*) 2 *Salk*. 610. and 3 *Mod*. 315. (*b*) 4 *Burr*. 2449.

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minster-hall. In its terms it confines the exercise of the several trades mentioned to persons who have been *brought up* to them for seven years, *as apprentices;* which seems to mean by *indentures* of apprenticeship: and yet it has been long held that carrying on a trade in fact for seven years will take the case out of the statute: and this has been so held not merely on one or two occasions at nisi prius, but by all the Judges upon consideration. The question then comes to this, whether this defendant, who merely embarked his capital in the trade of a miller, and employed competent persons to conduct the manual operations of it, can be said to have "set up, occupied, used, or exercised" the art, mystery, or manual occupation of a miller? The word *manual* does not indeed occur in the prohibitory part of the clause, but the words of the saving clearly relate to *manual* occupations, which shews the intention of the legislature to confine the prohibition in the 31st section to a setting up, occupying, using, and exercising, coupled with a *manual* occupation of the trade; and
[169] this I think is the rather to be collected from comparing that clause with the 29th, which speaks of trades upon a large scale, such as merchants, mercers, drapers, goldsmiths, ironmongers, embroiderers, and clothiers who put cloth to making and sale: these are only required not to take apprentices, or to instruct any person in their arts, sciences and mysteries, except persons of a certain description: and then follows the 30th clause, containing a description of persons, clearly of handicraftsmen, employed in the manual exercise of their respective employments, amongst whom are millers. From the company in which these are placed, it is evident that the legislature could never intend to include millers of the defendant's description, persons setting up and carrying on mills upon their capital, with expensive machinery, and employing others to conduct the manual operations of the business. Could the legislature have contemplated to require gentlemen of great substance conjoining their capital, as in the case of the *Albion Mills*, to carry on an extensive concern of this kind by the agency of skilful persons, to serve a previous apprenticeship of seven years in the business? The prohibition was obnoxious enough to the mere manual and operative miller, who happened not to have served a regular apprenticeship to it; but never could have been meant to be extended beyond such, and to prohibit the investment of capital by others in the several trades specified; and must therefore be taken only to relate to millers using the trade by way of manual occupation. Lord *Mansfield* was assisted by very learned Judges who concurred with him in the determination of the case of *Raynard* v. *Chase;* and Mr. Justice *Denison*, who was

one of them, considered that the statute was only levelled at the employment of unskilful persons in the * actual exercise of the trades. But here there was no want of skill in the persons employed by the defendant in the manual occupation of the trade. There was no personal interference of the defendant, except so far as directing whose corn should be ground. But the manual exercise of the business requiring the skill of a miller was performed by and under the direction of a qualified person, to whom also the apprentices were bound. Therefore, according to the sound policy of the Act, and the rule of construction which has been long adopted, narrowing the impolitic extension of the words of it in their most general sense, it does not appear to me to include this defendant, who merely lent his capital to the business, and took the profits of that capital by the operation of others who were duly qualified for the purpose, but did not himself exercise the manual occupation of a miller. [*170]

GROSE, J. I do not know how to say that this defendant was not a miller. He set up a mill, and conducted it himself upon the spot, and derived all the profits of a miller. It seems to me that he was more to be considered as the actual employer and master of the servants working in the mill than any other person.

LE BLANC, J. If the rule had been to set aside a verdict which the jury had found against the evidence upon their own consideration of it, I should not have thought it a proper case for the interference of the Court to direct a further trial: but considering the cause as having been determined by them on the direction of the learned Lord Chief Justice upon his construction of the statute, I am not prepared to say that a person of the defendant's description is not within it. In modern times there has been, I know, a considerable leaning against the provisions of this law; but while it remains in the statute-book I cannot say that the defendant is not brought by the evidence within the words of it. The object of the legislature was to require that certain enumerated trades should be carried on by persons of competent skill; and it has been considered by the Judges that that object was sufficiently secured within the provision of the act, by shewing that the party had served for seven years in the trade, though without a regular apprenticeship. And it has also been determined in *Raynard* v. *Chase*, that where there were two masters and partners in a trade, one of whom, who was duly qualified, had the entire management of the business, without any interference of the other; that other should not be considered, on account of his sharing the profits, as a person carrying on or using the manual occupation of the trade. [171]

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Thus far the decisions have gone, and thus far I am bound to say that the statute has been rightly construed. But the construction now contended for on the part of the defendant appears to me to go still further: for he is proved to be the person who superintends and sets to work all those who are employed in the mill; but because he does not personally assist in the manual labour and exercise of a miller, he is contended not to be such within the description and meaning of the statute, any more than the sleeping partner in *Raynard* v. *Chase*. But the cases do not appear to me to be analogous: for the sleeping partner there did not interfere at all in the conduct of the trade; whereas this person, though he does not interfere in the manual grinding of the corn, yet he superintends the person who has the actual management of the mill; he may dismiss him and appoint another; he directs whose corn
[172] shall be ground, and determines to whom credit is to be given. To say that a person so circumstanced does not carry on the trade of a miller would be pushing the construction further against the words of the act than any case has yet done: and the effect of this decision would be that such a person would not be protected by thus in fact carrying on a trade for seven years. If it were necessary to bring a party within the act that he should engage in the mere manual occupation of a trade, it would except almost every person who carries on an extensive trade of any kind; for the more extensive the superintendence necessary, the less likely he would be to engage personally in the manual part of it. But I think this defendant must be considered as carrying on the trade of a miller, having the sole direction of the persons employed in it, and determining to whom credit shall be given. This construction falls in with the determination in *Hobbs* v. *Young*, which seems to me to have given the true construction of the act. The authority of that case was saved by the Judges who determined the subsequent case of *Raynard* v. *Chase;* and the jury in this case having found their verdict upon the positive direction of my Lord in point of law, I cannot help thinking that there ought to be a new trial.

BAYLEY, J. My opinion has fluctuated in the course of this discussion; but now upon the best consideration I think that this case is not within the act. The legislature, it is argued, had two objects in view; first, to provide against the want of competent skill in the actual exercise of certain trades, and the consequent insufficiency of the commodities offered for sale to the public: and,
[173] next, to confine the right and benefit of setting up and carrying on such trades to those who had respectively served in them for seven years. But after the case of *Raynard* v. *Chase*, I cannot say that

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the latter was one of the objects of the legislature; for it was there held that a person might have the benefit of a trade without having served an apprenticeship to it. The trade was there carried on for the benefit of two, one of whom had not served an apprenticeship to it. Now I cannot distinguish between the cases where a trade has been carried on by two, one of whom receiving a share of the profits never interferes in it; and where it is carried on by one who receives the whole profits, but never interferes in the manual part of it, which is conducted by a person qualified as the act directs. The interest of the public is as well secured in the one case as in the other from the want of competent skill in the workmen, and from having bad commodities imposed upon them. In the case of *Hobbs* v. *Young* the defendant did interfere in the trade; for he provided the materials; and the skill of a trader may be as much wanted in the choice of materials, and the public may be as much injured from a bad selection of those, as in the working them up improperly. On this ground the Court might have considered the defendant *Young* as carrying on the trade of a clothworker. Looking therefore to the case *Raynard* v. *Chase*, which has now been decided for 56 years without question, and finding that a person may have the benefit of a trade within the act, without serving in it for seven years, if he do not manually interfere in the occupation of it: and seeing no difference between such a person paying the party who does actually carry on the trade by admitting him to a share of the profits as a partner, or by giving him a weekly stipend, as in this case, I concur with my Lord in thinking that his direction was right.

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The Court being equally divided, no rule was made.

GOODTITLE, Lessee of ELIZABETH VINCENT, *against* WHITE.

Monday, Feb. 10th.

THIS was an ejectment for lands in the parish of *Cricklade St. Sampson*, in the county of *Wilts*, brought upon the demise of *Elizabeth Vincent*; and at the trial before *Bayley*, J. at *Salisbury*, a special verdict was found, stating in substance, that *Maurice Vin-*

Upon a devise to the testator's wife *B* of all his real and personal estate, &c. in trust for the education and maintenance of his only daughter *M.* till she arrives at the age of 21; and in case of *M.*'s death before she arrives at 21, then a devise of the whole of his said estates and effects to *B.* his wife; held that *M.* the daughter took a present limited fee, either by descent or by implication under the will, upon the contingency of her dying under 21; and that *B.* the mother took an executory devise in fee, which, upon her death before the daughter attained 21, descended to the daughter; and that the daughter afterwards dying before she attained 21, such executory interest which did not unite with nor was merged or extinguished in the fee which she had ex parte paternâ during her life, descended to her heirs ex parte maternâ.

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cent, being seised in fee (inter alia) of the premises in question, on the 24th of *October* 1790, by his will of that date, duly executed and attested to pass real estates, devised as follows; "After pay-"ment of all my just debts and funeral charges, I hereby give, "devise, and bequeath unto my beloved wife *Barbara Vincent* all "and singular my real and personal estate and effects, whether "freehold, copyhold, or leasehold, bonds, book-debts, mortgages, "bills, household furniture, money in the funds, or any other "property of whatsoever kind, or wheresoever it may be, that I "now am possessed of or may be entitled to; in trust, neverthe-"less, for the education and maintenance of my only daughter, "*Mary Vincent* till she arrives at the age of 21 years; and in the "case of the death of my said daughter before she arrives at the
[175] "age of 21 years, I hereby give and devise the whole of my said "estates and effects unto my said wife." He then appointed his wife and *John Hawkins* his executors; and directed 30*l.* to be paid to the latter for his trouble. The testator died in 1790, shortly after making his will, leaving his wife *Barbara*, and his daughter *Mary*, who was his only child and heir at law, surviving him. *Barbara*, the widow, died intestate in 1793, in the lifetime of *Mary*, the daughter; and the said *Mary* was also the only child and heir at law of her mother *Barbara Vincent*. *Mary* died on the 2d of *November* 1802, *without having attained her age of* 21 *years*: having been, after her mother's death, by her guardian, in the receipt of the rents of the premises. *Elizabeth Vincent*, the lessor of the plaintiff (who is the only child of *James Vincent*, the brother of *Maurice Vincent*, the testator,) was and is the heir at law of *Mary Vincent*, the daughter, ex parte paternâ, and also heir at law of the testator *Maurice Vincent*. And the defendant, *Robert White*, was and is the heir at law of *Mary Vincent* ex parte maternâ. The special verdict then found the demise of the lessor of the plaintiff on the 11th of *October*, 46 *Geo.* 3. and the other formal parts of the case; and referred the question of law to the Court, Whether, upon the whole matter, the defendant was guilty of the trespass, &c.

This case was argued in the last term.

Preston, for the lessor of the plaintiff, the paternal heir, contended that upon the death of *Barbara Vincent*, the mother, in the lifetime of her daughter *Mary*, the executory interest of the mother, dependent upon the event of the daughter's dying under 21, descending to the daughter, became eo instanti extinct in the estate in
[176] fee of the daughter, which had descended to her ex parte paternâ. A fee-simple is the largest estate which a person can have, and may be divided into different portions consisting of particular estates,

and remainders; but when all these unite in one person, they form again the one entire fee-simple; for which purpose the law of merger, remitter, and extinguishment is adapted. *Merger* applies uniformly to *estates*, and takes place, independently of any intention of the party, as often as two estates carved out of the same fee meet in the same person, one of which is larger than the other which it receives into it; and that one must always be a remainder. *Remitter* interferes between the actual seisin and the rightful title, to put an end to a wrongful estate and avoid mesne incumbrances. But this case falls under the operation of *extinguishment*, which applies to every species of possibility of interest, and is not properly and strictly a case of merger. Here the possibility of an estate descending from the mother was extinguished in the actual and more worthy estate of the daughter, of which she had seisin ex parte paternâ, which estate was descendible from her, and deviseable and conveyable in its nature: for if the executory devise to the mother had been to take effect if the daughter died before 22, the daughter might have devised her own estate at 21, or conveyed it by lease and release, bargain and sale, or other assurance at common law. She could not have released it, because every person in the seisin must convey and cannot release. But the mother in her lifetime had merely a possibility of an estate; though she had an actual and complete interest in her immediately after the death of the devisor; which interest it must be admitted has been held to be deviseable and descendible; but while it was executory she could not have granted it at law (*a*), however assignable it was in equity (*b*), or barrable by [177] estoppel (*c*). She might have released it to her daughter. There are two sorts of possibility of estate; the one coupled with an interest, which is the case of an executory devise; the other a mere naked expectation, such as the right of an heir to succeed by descent to his ancestor. Mistakes have sometimes arisen from not distinguishing between these two kinds of possibilities. In *Goodtitle d. Gurnall* v. *Wood* (*d*), it was admitted that a bare possibility was not descendible, devisable, or grantable; but Lord C. J. *Willes* distinguished the case of an executory devise, as that was, where the executory devisee had survived the testator, but

(*a*) Vide *Carter's* case, cited in *Fulwood's* case, 4 *Rep.* 66. *b.* and *Lampet's* case, 10 *Rep.* 49. *b.*

(*b*) Vide *Thimpland* v. *Courteney*, 2 *Freem.* 250. *Theobald* v. *Duffey*, 2 *P. Wms.* 608.; and *Wright* v. *Wright*, 1 *Ves.* 409.

(*c*) Vide *Weale* v. *Lower*, *Pollex.* 54. in the case of a contingent remainder; and *Vick* v. *Edwards*, 3 *P. Wms.* 372. (*d*) *Willes*, 211.

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had died before the contingency happened which destroyed the prior estate; in which case the executory interest was held to descend to the heir of the devisee, and was resembled to a contingent remainder restrained only as to the happening of the contingency within a life or lives in being, and 21 years afterwards. Then, to pursue the analogy, if such contingent interest unite in the same person with the inheritance in fee, the contingent interest is absorbed in the fee-simple. *Lampert's* case (*a*) was that of a devise of a long term of years to *J. M.* for life, remainder to *E. M.* and the heir of her body: but as the law does not admit of a limitation over of a chattel interest after a life estate, the whole
[178] interest in the term vested at law in the first devisee, and the remainder over was considered as a mere possibility. The third question in that case was whether such an executory devise over could be barred by the tenant for life; and held that it could not: but it was also resolved (7thly, that it might be released by her in remainder; and that such release consolidated and perfected the before defeasible estate of *J. M.* Here then the executory interest of the mother descending to the daughter who was seised of the before defeasible estate of inheritance in the land operated as a release in law, upon the maxim that fortior et potentior est dispositio legis quam hominis (*b*). For by *Lit. s.* 11. a man cannot have a more large or greater estate of inheritance than a fee-simple: and Lord *Coke*, in his Comment (*c*), says, "If the king make a gift in tail, and the donee be attained of treason; in this case the king hath not two fee-simples in him, viz. the ancient reversion in fee, and a fee-simple determinable upon the dying without issue of the tenant in tail; but both of them are consolidated and conjoined together." That is, the base fee unites with the former fee-simple, which was in the king. There may indeed, by operation of the statute de donis, be two estates in fee preserved in the same person, that is, an estate in fee tail, and a reversion in fee; the one qualified, the other absolute: but a fine levied by the party so seised extinguishes the estate-tail and brings the reversion into immediate possession; as in *Symonds* v. *Cudmore* (*d*). Fee-tails were protected from merger in the reversion only by the statute de donis: as long as the estate descended to the issue in tail they were considered as purchasers; and therefore as soon as the right
[179] of the issue was out of the question, the law merged the estate-tail in the ultimate fee. But in no case at common law can one fee-simple depend upon another in the same land, or exist together

(*a*) 10 *Rep.* 46. (*b*) Vide *Co. Lit.* 234. *a.* (*c*) *Co. Lit.* 18.
(*d*) 4 *Mod.* 1. *Carth.* 257.; and 1 *Salk.* 338.

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in the same person; and wherever the law would merge a less estate in a greater derived out of the same fee, coming together in the same person, it will produce the same effect by extinguishment of this species of executory interest coming to the party who is in the seisin of the inheritance in fee. It may have been the intention of the testator that the heir of the mother should take in the event which has happened: but where a positive rule of descent intervenes, the intention of a testator cannot supersede it. In *Goodright d. Alston* v. *Wells*, (*a*) *Willes*, J. said that where the question was between the paternal and maternal heirs, the law always gives the preference to the former. This indeed must be taken with some allowance (*b*). That was the case of the legal estate in fee descending ex parte maternâ, which was held to merge in it the equitable interest descending ex parte paternâ. And the same opinion was held by the Master of the Rolls in *Selby* v. *Alston* (*c*). Here no such question arises, as both the descents were of legal estates in fee: but as the daughter had in the first instance an entire seisin of the inheritance in fee ex parte paternâ, defeasible only by a possibility, when that [180] possibility descended to her in the maternal line, she held her original estate discharged of the possibility of defeasance, by the release of the law operating by way of extinguishment, in like manner as a condition coming to the person seised in fee would be extinguished in the seisin in fee. Supposing the mother seised in fee, and the daughter to have disseised her, and then the mother had died; the daughter could not have been remitted to her better estate by descent, because no one is remitted against their own wrongful act: the consequence would have been that the estate which she took by descent from her mother would be merged or extinguished in the fee which she acquired by disseisin, and her heir ex parte paternâ would take. A fortiori then the same consequence will ensue where she was before in the seisin of a rightful estate in fee. After the descent of the possibility to the daughter, how can it be said that she still had a determinable fee? In whose favour was it to be determined? It is inconsistent with all legal analogy that the same person should at common law hold a

(*a*) *Dougl.* 778.

(*b*) Vide *Martin d. Tregonwell* v. *Strachan*, *Willes*, 444.—8, where the question arose between the paternal and maternal heirs, (upon a recovery suffered by tenant in tail of lands *by purchase* under a settlement made by a maternal ancestor, with reversion in fee by descent ex parte maternâ, to the use of himself and his *heirs*,) Lord C. J. *Willes* said that when a party takes *by purchase*, it shall always go in the first place to his heirs on the part of the father, *they* being considered as the most worthy.

(*c*) 3 *Ves. jun.* 339.

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determinable fee and an absolute fee in the same land. As there cannot be two fees in the land, whenever a person grants a determinable or conditional fee, he retains a possibility of reverter: but if the possibility or condition come to the person who has the seisin, the estate becomes absolute. Otherwise where one grants an estate to another and his heirs until a certain tree falls, and then over; it must be contended that these two interests, though united afterwards by different descents in one person, should be kept apart for the benefit of different classes of heirs. Suppose the daughter's estate to have been defeasible if she died before 22; and after the death of her mother, and her attaining 21, she had granted a lease
[181] or rent-charge, and then died before the given age; it would be hard that her lease or rent-charge should determine, though she had in her the whole interest in the land at the time. Suppose in the like case the daughter had been disseised, and a fine had been levied with proclamations by the disseisor; and after her attaining 21, the mother had died, and then she herself had died before 22; there would, according to the defendant's argument, have been two fees descended to the daughter, and different periods for her and her different lines of heirs to make claim; and she and her paternal heirs would be barred by non-claim before she and her maternal heirs would be barred. But the daughter having had the complete power of alienation, the acts of parliament for regulating fines never meant to protect two fees; otherwise executory interests may be kept alive notwithstanding the levy of a fine to bar the party interested.

This point is indeed said to have been decided against the paternal heirs in *Goodright d. Larmer* v. *Searle* (*a*), which has governed the later opinions; no judgment was however given in that case; but the reporter states with an "ut audivi," that the Court were all agreed for the defendant, and that the Chief Justice was ready to deliver their opinion, but deferred it, in order to afford the parties an opportunity of making an amicable arrangement. So far as the grounds of their supposed opinion may be collected from what was thrown out by the Judges on the first argument of the case, they do not seem to warrant it. The Court looked only to the doctrine of merger, within which they thought that the case did not fall; and seem principally to have regarded
[182] the time when the event had happened, and not the prior period. The doctrine of merger could not apply, because in order to produce a merger, there must be two estates; whereas there was only

(*a*) 2 *Wils.* 29.

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one estate in being and a possibility of another. One of the Judges there inclined to a different opinion. The reporter also refers in the margin to the case of *Goodtitle d. Gurnall* v. *Wood*, as governing the principal case; but which appears by the report of that case since published (*a*), to have been a mistake: that case only goes the length of shewing that such an executory interest immediately descended to the heir of the devisee, who survived the testator, but died before the contingency happened. The Judges did not advert to the doctrine of extinguishment, on which the question turns, and which is defined in *Sheppard*'s *Abridgment* (*b*) to be "the effect of consolidation, and to be used for a perpetual stop of a man's right." And then he gives an example, where one hath a perpetual rent-charge, and he afterwards purchases the land in fee, the rent is thereby extinct. Then having given other instances, which are in truth instances of merger, he proceeds to state of what things there may be an extinguishment property so called, and enumerates services, liberties, immunities, &c. seignory, rent, &c. franchises, way of a condition, rights of entry, &c. rights, titles, and the like; and refers to *Co. Litt.* 313. *a.* So *Sheppard*'s *Touchstone*, 154. (*ch.* 6. *Of a condition,*) "If one make a feoffment in fee of land, upon condition, and after, and before the condition broken, he doth make an absolute feoffment, or levy a fine of all or part of the land in the feoffee or any other; by this the condition is gone and discharged for ever." Again: "If the feoffor release to the [183] feoffee all conditions, or all demands on the land, or confirm the estate of the feoffee, without condition, &c.; by either of these means the condition is destroyed and gone for ever." Now an executory devise operates on the estate of the first taker as a condition, though as a limitation to the executory devisee; and therefore it is called a conditional limitation; a condition to defeat the first estate, and a limitation to give it over. The creation of such an interest was an inroad upon the common law in order to give effect to the intention of testators, and ought therefore to be governed by the strict nature of conditions at common law, which are to defeat an estate, and according to which the union of the estate with the condition extinguishes the latter, and confirms and perfects the estate. Thus it appears by *Ognel*'s *case* (*c*), that if the father grant a rent-charge out of certain lands to his son in fee, and dies; by the descent of lands to the son, the rent is extinct by act in law. And yet the son there had a fee in the rent.

(*a*) *Willes*, 211. (*b*) 2 *Part*, *p.* 144. (*c*) 4 *Rep.* 49.

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Suppose the rent-charge had descended to him from the mother after the death of the father, must it not have been equally extinct? In the year-book, 7 *H.* 6. 3. *b.* in the case of a mesne lord marrying a feme tenant, and having issue, who became seised, and died without issue; it was argued that the mesnalty, which was suspended during the coverture, would go to the paternal, and the tenancy to the maternal heir, although they were united in one hand: but this was denied. In the present case no benefit could enure to the daughter during her life by keeping her estate in fee from the father separate from the interest descended to her from
[184] the mother: and even with respect to her heirs, if the estate and the possibility were united, there could be no escheat while there were any heirs left in either line of descent, though the paternal heirs would first take; whereas if they were kept separate, there might be an escheat on failure of one set of heirs only.

Sugden, contrà, said that a previous question arose upon this will, namely, whether under the first devise the mother took a present fee, or only a term of years, till her daughter attained 21; because if she took a fee by reason of the devise to her of all the testator's real estate, &c. the other question upon the executory devise, which had been argued, would not arise; for though she would take as a trustee, yet she would take as a purchaser, and the legal estate would descend from her to the daughter. Upon this head he shortly argued that in all the cases of a devise to one for the benefit of another till a given time, from *Boraston*'s case (*a*) downwards, it has been necessary to cut down the estate to a term of years, in order to effectuate the intention of the testator, that the party beneficially entitled should take a vested fee. *Denn* v. *Satterthwaite* (*b*), and *Doe* v. *Lea* (*c*) are to that effect. But that here there was no such necessity, as the testator meant that his wife should have beneficially the estate in fee, if the daughter did not attain 21; the wife might therefore, consistently with the intent, take a legal fee in the first instance, by force of the devise to her of all his *estates*, &c. to hold for the benefit of the daughter
[185] until the age of 21, if she lived to attain it; if not, then for her own benefit. But he said it was not necessary to press this point, as he thought the other was clearly with him upon principle and authorities.

Secondly, the nature of an executory devise was well consi-

(*a*) 3 *Rep.* 19. (*b*) 1 *Blac.* 519.

(*c*) 3 *Term Rep.* 41.; and vide *Goodright* v. *Hoskins*, 9 *East*, 306. and the cases there cited.

dered in *Pells* v. *Brown* (*a*); and it was agreed that upon a devise to *Thomas Brown* and his heirs, &c., and if he died, living *William*, his brother, then to *William* and his heirs, &c.; *William* could not take by way of remainder, because one fee cannot be in remainder after another: but that it was good by way of executory devise, to determine the estate to one upon a contingency, and limit it to another. The two estates do not exist at the same time, but when one ceases the other arises; and so it was held in *Loddington* v. *Kime* (*b*). Admitting that an executory devise is descendible and deviseable, and might perhaps be conveyed by estoppel, though not by grant, the conclusion contended for does not follow, that it was extinguished in this case upon the descent of it to the daughter from the mother. This is admitted not to be a case of merger or remitter; and yet reliance was had throughout the plaintiff's argument upon the doctrine of merger, under another name, that of extinguishment. Merger is as to estates what extinguishment is as applied to rents, services, and the like, issuing out of or annexed by grant to the original fee; and therefore merger and extinguishment are continually blended in the books. This sufficiently appears from what is said in *Co. Lit.* 313. *a* & *b*. This cannot be merger; for to produce merger there must be two estates, one greater than the other: but the executory devise was no estate, but rested in possibility only during the continuance of the first estate: they could never be co-existent, [186] and therefore could never unite and merge one in the other. For the same reason the one could not be extinguished in the other, having no existence together. The doctrine of extinguishment is altogether a doctrine of tenure, with which executory devises, the creatures of modern invention, to give effect to the intention of unexperienced testators, have no connection. But even in case of estates, one greater than another, carved out of the same fee, the law is very tender of merging the latter, where the interests of third persons, as the maternal heirs in this case, are concerned. So with respect to extinguishment, Lord *Coke* (*c*) says, that not only must the tenant have as high and as great an estate in the tenements as the lord hath in the seignory who grants the services in fee to the tenant, as *Littleton* had said; but the lord must have "as *perdurable* an estate also; for a disseisor or *tenant in fee upon condition* hath as high and great an estate, but not so perdurable an estate as shall make an extinguishment." If then there could be either merger or extinguishment in a case

(*a*) *Cro. Jac.* 590. (*b*) 1 *Salk.* 224. (*c*) *Co. Lit.* 313. *b. sect.* 561.

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like the present, it would rather follow that the defeasible fee would be merged or extinguished in the absolute fee, than the reverse. Nothing can be inferred from the passage cited from the year-book 7 *H.* 6. 3. *b*, where it is put in argument by one counsel and denied by another, that the mesne seignory and the tenancy, descending to a party from different lines of ancestors, shall upon his death separate again. But the first opinion seems to be the best founded; for in *C. B. Hilary*, 23 *Eliz.* (*a*), the case was that a parson having common appendant to his parsonage
[187] out of the lands of an abbey, the abbot had the parsonage afterwards appropriated to him and his successors; and the question was whether the common was thereby extinct. But *Windham* and *Meade*, Justices, (who alone delivered any opinion,) conceived that the abbot had not as perdurable an estate in the one as in the other; for the parsonage might be disappropriated, and then the parson should have the common again. And they put the very case in the year-book: "As if a man hath a seignory in fee, and afterwards lands descend to him on the part of the mother, in that case the seignory is not extinguished but suspended; for if the lord to whom the land descends die without issue, the seignory shall go to the heir on the part of the father, and the tenancy to the heir on the part of the mother; and yet the father had as high an estate in the tenancy as in the seignory." As little can the doctrine of surrender apply, as a surrender in law; because that cannot have place without a privity or estate; where the surrender is made by one in possession to him who has the next estate in remainder. Again, both the estates in question are rightful estates, and therefore according to *Co. Lit.* (*b*), there can be no remitter; for in order to make a remitter, the party must first have a rightful estate, of which he is dispossessed, and then acquire a defeasible title of freehold by descent or other lawful act, and not by his own wrongful act: in which event the law remits him to his ancient and better right. The present case is rather the converse of that; for here the daughter first had a defeasible estate, and afterwards by right acquired an absolute and more perfect estate. Then it is argued that though the executory
[188] devise cannot be granted, it may be released: and that coming to the daughter by descent, it shall be taken to be a release in law. But as the reason why it cannot be granted is because it has no existence during the continuance of the first estate, the same reason would shew that no such possibility would pass by release,

(*a*) *Godb.* 4. *case* 5. (*b*) 346. *b.*—350. *b.* *s.* 659.—665.

however it might operate by way of estoppel in either case. At any rate grants and releases are acts done by the parties, and not acts of law; and the question here is what is the effect of such a possibility descending to one who is seised of the prior estate in fee, without any act done by the parties. This is quite different from the cases of charges and the like granted to one out of an estate by the owner of the fee, where the fee comes to the grantee of the charge, and absorbs the charge in his higher interest. But even then, if it be more convenient to the owner to keep the charge alive, as where the charge is a chattel interest which he might devise by will before he came of age, a court of equity will not merge it. In *Co. Lit.* 268. the case is put by *Littleton* of a release of the seignory by the lord to the disseisee of the land, which is good by reason only of the *privity of estate* which is between them: on which Lord *Coke* notes the diversity between a seignory or rent-service, and a rent-charge, the former of which may be released and extinguished to him that hath but a bare right in the land, by reason of the *privity* between the lord and the tenant in right: but not the rent-charge, because there is no such privity in the case of a charge which lies only on the land. And he notes a second diversity between a seignory and a bare right to land; for a release of a bare right to land to one that hath but a bare right, is void. Now here there was no privity of estate between the mother and daughter in the life-time of the [189] mother. The executory remainder was but a bare right, which right never came into existence except by the destruction of the daughter's present estate. An estate-tail is nothing more than a particular estate carved out of the same fee with the remainder or reversion, and is only prevented from merging in it by the protection of the statute de donis. There, if a fine be levied by tenant in tail, he acquires a base fee determinable on failure of issue, and the remainder-man has also a fee, which is conveyable as well as deviseable. But that is an anomalous case depending wholly upon the effect of the statute. And some questions have arisen, as in *Stringer* v. *New* (*a*), whether tenant in tail with reversion in fee by descent, has done any *act* to alter the descent of the reversion, so as to exclude the half-blood: but it never was questioned that if no act were done by him, the reversion would descend in the line of the ancestor from whom it was derived, notwithstanding the meeting of the two estates in the same person. The rules respecting conditions to defeat an estate do not

(*a*) 9 *Mod.* 363.

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apply: for there the condition affects the very fee in existence, and operates on it in the nature of a forfeiture. But this is an original creation of two separate fees, not indeed co-existent, for that could not be; but the one to arise only when the other ceases, upon the happening of a certain event. It appears from the case of *Roach* v. *Wadham* (*a*) that a power may be given to the very party himself to destroy by his own act his own estate in fee, and to appoint another; for that was a conveyance to a trustee in fee to the use of such person and for such estate as *W.*
[190] should by deed appoint, and for want of such limitation, to the use of *W.* himself in fee. It was held that he thereby took a vested fee, liable to be devested by the execution of his power. That was a stronger case than the present for arguing for the extinction of the power in the fee, which it was to defeat; as it had been considered at first in *Maundrell* v. *Maundrell* (*b*); though that opinion was afterwards revised (*c*), and it was held that such a power might well subsist apart in the owner of the fee. Such a power is in truth a contingent use, and the estate created by it comes in the place of the power itself, the execution of which displaces the old fee of the owner, and creates a new fee in the appointee. The execution of these powers arises out of the statute of uses, as executory devises arise out of the statutable power of devising. The first estate is a determinable fee; but the executory fee does not exist till the event which determines the other; so that the two can never blend together.

But independently of principle, this case is surrounded by decisions and authorities. The case of *Goodright* v. *Searle* (*d*) is in point, as the judgment was prepared to be pronounced according to the reporter, who must be supposed to have had good authority for what he states in that respect, and which has ever since been acted upon. It was considered to be law by Lord *Alvanley* in *Doe* v. *Hutton* (*e*), who cites and adopts the opinion of Mr. *Fearne* (*f*), confirmatory of the same doctrine. Besides which, the same point has been already decided by the Court of Common Pleas, between these very parties (*g*). Then with re-
[191] spect to the intention of the testator in this case, it is quite clear that he meant in the event which has happened to make the mother a new stock; and the Court are at best required to stretch the rules of tenure, which do not apply to such a case, even if

(*a*) 6 *East*, 289. (*b*) 7 *Ves.* 583. (*c*) 10 *Ves.* 246.
(*d*) 2 *Wils.* 29. (*e*) 3 *Bos. & Pull.* 655.
(*f*) 2 vol. of *Cont. Rem. and Ex. Dev.* 449.
(*g*) *Goodtitle d. Vincent* v. *White*, *New Rep.* 383.

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they would answer the purpose, (which was denied,) in order to destroy his manifest intention.

Preston, in reply, said that the first point as to the construction of the devise, which had not been made in the Court of C. P., was decided in *Tomkins* v. *Tomkins* (*a*), where upon a devise to one, in trust for his eldest son *B.* till he should attain 21 years; and if he should die before 21, then a devise over; it was held that *B.* took the whole by implication, the limitation being only of the trust, and not of *B.*'s interest. As to the second point, it would be inconsistent to say that the daughter had a fee determinable, when she had in her at the same time after the descent from her mother that interest which was to have determined it. It is said that the possibility ought to be kept distinguished from the fee of which she was seised, for the sake of the different line of *heirs* who might inherit it; but the law never looks to *heirs* in the lifetime of the ancestor; but will absorb the equitable in the legal fee, as in *Goodright* v. *Wells* (*b*), without regard to the alteration of the descent. When the case of *Pells* v. *Brown* (*c*) was decided, the nature of executory devises had not been so well considered as they have been since: it was not decided till afterwards that they were a present existing interest (*d*), deviseable and descendible. If in this case the devise over had been to the mother if the daughter died before 22; and the daughter [192] after attaining 21, and after her mother's death, had devised the property to another in fee; it cannot be denied that her devisee would have had the entire fee in him. Then must she not have had in herself that which she could devise, or which could descend to another. She was the potential owner: and *Shep. Touch.* 238. says, that a possibility, coupled with an interest, is even grantable. There may be a surrender or release in law as well as in fact, that is when the surrenderable or releaseable interests come to the person who was before capable of accepting a surrender or release in fact: and such surrender or release in law operates by extinguishment of the interest which cannot be merged. If the daughter and mother had joined in a conveyance, it would have operated as the grant of the one and the release of the other. A surrender or release in law takes place apart from any intention of the party. So a remitter may take place even against the party's will, as appears by *Co. Litt.* 358. *a.* and *b.* and *Com. Dig.* tit. *Remitter.*

(*a*) In Chanc. *H.* 17 *Geo.* 2., cited in *Goodtitle* v. *Whitby*, 1 *Burr.* 234.
(*b*) *Dougl.* 778. (*c*) *Cro. Jac.* 590.
(*d*) *Doe d. Gurnall* v. *Wood*, *Willes*, 211.

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And the cases of *Symonds* v. *Cudmore*(*a*), *Kinaston* v. *Clark*(*b*), and *Lord Shelburne* v. *Biddulph* (*c*), are also instances of interests let in by operation of law against the intention of the parties. It is true that an executory devise is not strictly a remainder; but though not creatable by deed, it may be deemed a contingent remainder by will: and the law which always tends to unite all interests into one, which meet in the same person, will then absorb the contingent in the existing fee. What difference is there, whether a party has a fee subject to a condition, or subject to an executory devise? The executory devise operates on the first
[193] estate as a condition. Suppose the mother had died without heirs, other than the daughter, how could the lord have claimed by escheat upon the death of the daughter leaving paternal heirs? It is true that if interests be not equally perdurable, there is no merger, but only a suspension; and therefore if the fee descend by a bad title to one who before had a good title to a rent-charge, the rent is only suspended during the continuance of the bad title: but every fee determinable only upon a contingency is, before the contingency, in contemplation of law as perdurable as any other, and therefore no other fee can be limited upon it in remainder by any common law conveyance. But taking it to be an interest descendible, by the rule of law a descent is to be derived from the person last seised; and here the daughter, who was in the seisin of an estate in fee as perdurable in law as the contingent interest, was the person last seised of that interest which was extinguished in the existing fee. It is said that here was no *act done*, such as a release or surrender in fact; but the act of the law is more strong than the act of the party. It is also said that the doctrine of merger or extinguishment shall never be applied to the prejudice of another: that is true as to strangers, and third parties, but heirs are considered in the same light as the ancestors themselves in whom the estates or interests merged or were extinguished. Cases were cited to shew that a power to destroy the fee might exist in the party seised; but those are cases of uses; for no such power could exist separately in the owner of the fee at common law. Lastly, with respect to the weight of the direct authorities on this point; the case of *Goodright* v. *Searle*, supposing the reporter to be right in his account of the judgment intended to have been delivered by the Court, is at all events open to the observation, that as no judg-
[194] ment was actually given by reason of the compromise, there was no opportunity of revising that opinion upon a writ of error: and the subsequent opinions have been altogether founded on that case.

(*a*) 4 *Mod.* 1. (*b*) 2 *Atk.* 204. (*c*) 4 *Bro. P. C.* 594.

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And the former decision of the present case by the Court of C. P., which was also governed by *Goodright* v. *Searle*, was given upon a case reserved, which therefore could not be carried to the dernier resort. The question therefore is still open to be discussed upon principle by way of writ of error from that judgment.

Curia adv. vult.

Lord ELLENBOROUGH, C. J. now delivered the judgment of the Court.

This was a question between the heir ex parte paternâ, and the heir ex parte maternâ of *Mary Vincent*. The ejectment was brought by the heir ex parte paternâ, (*Elizabeth Vincent*,) and a special verdict was found which states the following facts. That *Maurice Vincent* was seised in fee; that he made his will duly executed and attested, and thereby devised all his estates and effects to his wife *Barbara Vincent;* in trust nevertheless for the education and maintenance of his only daughter *Mary Vincent*, till she should arrive at 21; and in case of her death before she arrived at 21, then he gave the whole of his estate and effects unto his said wife. That the testator died, leaving his widow and daughter him surviving; that the widow died in the lifetime of the daughter; that the daughter was the heir at law to the testator and to his widow; that she by her guardian was in receipt of the rents of the estate after her mother's death; that she died under 21; that *Elizabeth Vincent*, one of the lessors of the plaintiff, is her heir at law ex parte paternâ, and the defendant her heir at law ex parte maternâ. And the question upon these facts is whether the heir ex parte paternâ or [195] the heir ex parte maternâ is entitled? The will limits a fee-simple in favour of the widow to commence in futuro, which is good by way of executory devise, upon the contingency of the daughter's dying under 21; and the daughter had a limited fee, either by descent, or by implication under the will, to determine if she died under 21. If that contingency (viz. the daughter's death under 21) happened, the widow was to have the full enjoyment and the complete control over the estate; and if she did not control it, but left it to a course of descent, the descent was to be in her line, to her heirs; not in the testator's line, to his heirs. Upon the widow's death the chance of enjoying the future fee, if the daughter should die under 21, descended upon the daughter, as the mother's heir; so that she had from her father one fee determinable if she should die under 21, and from her mother another fee to commence upon her so dying; and if these two fees, the one in esse, and the other in posse, continued distinct in her, the defendant is entitled to the estate; if they became united, so as to form one entire indefeasible

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and absolute fee-simple, it belongs to the lessor of the plaintiff. On the part of the lessor of the plaintiff it was admitted that there was no authority in point for the plaintiff, but it was urged that upon principle when two fees unite in the same person, the first of which is determinable, and the second to commence when the first ends, they necessarily coalesce, and from one entire fee-simple, and cannot by law continue distinct. On the defendant's part it was urged that they might continue distinct, and that there were authorities in point to that effect. And we are of opinion that the defend-
[196] ant is right in the proposition he contends for. This is not the case of a limited fee and a reversionary fee co-existing in the same person, as would be the case if a fee simple conditional at common law and the reversionary interest of the person who granted it were to vest in the same person, which would create a merger. (4 *Mod.* 5. and 5 *Term Rep.* 109, 110.) It is not the union of two concurrent co-existing fees, but it is the case of one limited and determinable fee, and of another fee not concurrent, but created de novo by a mode unknown in early times, to commence in futuro upon the ending of the limited fee; and until such limited fee ceases, it has no existence, nor any thing beyond the chance of future existence. The second fee is not the old reversion waiting upon the limited fee, and constantly in esse whilst that limited fee continues, but it is a new fee which will never be in esse until the limited fee ceases. No act done by the owner of the limited fee during the continuance of such limited fee will enable the person in whom the chance to the second is vested to interfere. If the limited fee were to end if *J. S.* should die without leaving issue at his death by *J. N.*, and *J. N.* were dead without issue, so that the commencement of the second fee upon the death of *J. S.* was become matter of certainty, yet the person to whom the second fee was limited would in legal contemplation have nothing but a possibility till *J. S.*'s death. This is a case therefore of *successive*, not of *concurrent co-existing fees;* and in the case of successive fees of this description, what authorities there are are all against the plaintiff. *Goodright* v. *Searle*, 2 *Wils.* 29. is almost this very case. *George Painter* devised to his son in fee, but if the son should die under 21, and without leaving issue at his death, to the testator's mother in fee. The testator died;
[197] the mother died; and the contingent limitation in her favour descended to the son: the son died under 21, and without issue; and the question was whether upon his death the estate descended to his heir ex parte paternâ, or to the heirs of his grandmother, the contingent devisee. It came before the Court on special verdict, and on the first argument *Willes*, C. J. *Clive* and *Birch* Justices

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thought the two interests continued distinct in the son, and did not unite, and that upon his death the interest he took as devisee ceased, and the interest he took by descent from his grandmother as her heir came into possession, and therefore passed to her heir. *Bathurst* J. thought that when the grandmother's interest descended to the son, he should be in of his better estate, viz. a pure fee, which would descend to his heirs ex parte paternâ. The case was argued a second time, and then the Court were all agreed, and the Chief Justice was prepared to deliver their opinion, but they deferred it, because the parties were endeavouring to compromise; and no opinion was ever delivered. It has however been generally supposed that their opinion was in favour of the defendant. Mr. Serjt. *Wilson* adds at the bottom of his report, "they were all of opinion for the defendant, ut audivi." His book was published in 1770, and whilst Sir *Edward Clive* and Mr. J. *Bathurst* were still Judges of the Court, though they did not long continue so; and yet this surmise was never contradicted. Mr. *Fearne* supposes *that* to have been the opinion in his book upon Contingent Remainders and Executory Devisees, (3d edit. p. 448.) Mr. *Watkins* so considers it in his book of Descents, c. 3. s. 2. and so does Lord *Alvanley* in *Doe* v. *Hutton*, 3 *Bos. & Pull.* 656. Mr. *Fearne*, who had turned his mind with great acuteness and accuracy to the cases [198] upon real property, and who was likely to have sought for and obtained the best information upon the subject, not only supposes this to have been in fact the opinion of the Court, but gives his reasons why the two estates could not possibly unite, and consequently why the Court could not have come to any other conclusion than that which he assumes it to have done. Lord *Alvanley*, who to a very sound judgment joined a very accurate knowledge of the law of real property, in a very elaborate judgment which he delivered in *Doe* v. *Hutton*, 3 *Bos. & Pull.* 656, and which was not delivered immediately after the argument, but after the Court had taken time to consider, states *Goodright* v. *Searle* very much at length; notices with approbation what Mr. *Fearne* had said upon it, and evidently gives it the sanction of his concurrence. *Goodright* v. *Searle* may therefore be considered as having stood as a decision and rule of property from the year 1756: it is stated as such in the best text books which have been published: it never appears to have been questioned till this will occurred. *Goodright* v. *Searle* however is not the only authority; for in *Goodtitle* v. *White*, 2 *New Rep.* 383, there is a decision in point by the Court of Common Pleas on this very will. There *Elizabeth Vincent*, who brings this ejectment, was one of the lessors of the plaintiff: the ejectment was for the

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same premises as this is: the Court was so clear against the plaintiff, that they stopped the defendant's counsel; and *Heath* J. and *Chambre*, J. observed there was no ground for the argument "of an union of the two estates; for the moment one estate" (viz. that devised to the mother) "commenced, the other" (viz. that which descended to *Mary Vincent* from her father) "ceased." These

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authorities are so strong, that they ought not to be departed from, unless they were inconsistent with some settled principle of law, or had a manifest tendency to produce some serious inconvenience; and no such inconsistency or tendency has been established. It would possibly have been of no great prejudice when the question was first raised, if the concurrence of two such interests in the same person had been held to coalesce; but we are not aware that any advantage would have resulted from it; and in this instance at least, as well as in *Goodright* v. *Searle*, it would have militated against what we must suppose to have been the testator's intention. By limiting the fee to the widow in this case, and to the mother in that, the respective testators must be taken to have intended, that if the death, under 21, should occur, and the widow or mother should do nothing to break the course of descent, the descent should be in their lines, not in the testators': and this supposed intention would have been frustrated, had the interest been adjudged to have coalesced. For these reasons we are of opinion that the lessor of the plaintiff, the heir ex parte paterna, is not entitled, and that there must be judgment for the defendant.

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Monday, Feb. 10th.

The KING *against* The Justices of DORSETSHIRE (*a*.)

Where overseers' accounts were not allowed till the last day when an effectual notice of appeal to the then next sessions could have been given, and it did not appear when the party objecting had notice of such allowance; held that neither under the stat. 43 *Eliz. c.* 2. *s.* 6. nor under the stat. 17 *G.* 2. *c.* 38. *s.* 4. (supposing the latter to be a repeal of the other as to giving an appeal to the *next* session after the verification and allowance of such accounts, instead of giving the appeal *generally* as the stat. of *Elizabeth* does,) was the appeal too late to the next subsequent sessions, for which an effectual notice of appeal could be given; particularly where there seemed to be management to defeat the appeal.

CASBERD obtained a rule in the last term, calling upon the defendants to shew cause why a writ of mandamus should not issue, commanding them to cause continuances to beentered to the then next general quarter sessions, upon the appeal of *Charles Bowles* against the allowance of the account of *William Goddard*, as overseer of the poor of the parish of the *Holy Trinity* in *Shaftesbury*, and at such sessions to hear and determine the matter of the said appeal.

This rule was obtained on the affidavit of *Bowles*, which stated the appointment of *Goddard* and *Baker* as overseers in 1810; that

(*a*) Note of *M.* and *S.*

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soon after the 7th of *May* 1811, when they ceased to be overseers, the account of *Goddard's* receipts and payments, as overseer, was submitted to the magistrates of the borough of *Shaftesbury*, at their special sessions holden for the purpose, for their allowance of the same, when *Bowles* objected to certain items in that account, and stated that if they were allowed, he should appeal against the allowance; and thereupon the justices refused the allowance of the said account, but did not strike out the items objected to; alleging that the stat 50 *Geo.* 3. *c.* 49. was not imperative upon them, but only authorized them to examine the accounts of overseers if they thought proper. That on the 8th of *July* last, and not before, the said account was verified on the oath of *Goddard* before two magistrates of the borough, and by them allowed; and that the said 8th of *July* was the last day permitted by the practice of the [201] sessions for giving notice of appeals to the then next sessions, which were holden in the same month of *July:* and that the items objected to still remaining in the account, *Bowles* gave notice of appeal against such account and allowance to the next subsequent sessions, holden on the 8th of *October*; at which sessions the justices, conceiving the deponent ought to have appealed at the former sessions, dismissed the appeal on that account. Against this

Pell, Serjt. and *P. Williams* shewed cause on a former day in this term, and contended, 1st, that the statute 17 *G.* 2. *c.* 38. *s.* 4. limited the time of appeal to the *next* sessions, and was in this respect a repeal of the stat. 43 *Eliz. c.* 2. *s.* 6., which gave an appeal without any such limitation. 2dly, That the appellant should have entered and tried, or at least have entered and respited his appeal at the *Midsummer* sessions. 1st, The appeal against overseers' accounts must be governed by the same rule of construction as that against a poor's-rate. Both are given and limited by the same clauses of the same statutes, viz. the 43 *Eliz. c.* 2. *s.* 6., and 17 *G.* 2. *c.* 38. *s.* 4., which must therefore be taken to be in pari materiâ. It was held in *Rex* v. *St. Giles* (*a*), that an appeal against a poor's-rate might on the stat. of *Eliz.* be made at any distance of time: but since the stat. 17 *G.* 2. and the decisions upon it in *Rex* v. *Coode* (*b*), *Rex* v. *Micklefield* (*c*), and *Rex* v. *Atkins* (*d*), it has been settled that it must be to the *next* sessions. The stat. 17 *G.* 2. is a remedial law, which was passed, amongst other things, for the purpose of preventing appeals at any distance [202] of time: the Court therefore will construe it liberally, and equally apply it to the case of appeals against overseers' accounts as to

(*a*) 11 *Mod.* 259.
(*b*) 1 *Bott.* 236.
(*c*) *Ib.* 239.
(*d*) 4 *Term Rep.* 12.

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appeals against a poors'-rate; where the mischief of protracted appeals seems to be the same. Besides, if it be holden that under the stat. 42 *Eliz.* the party may appeal to any sessions after the next, it will oust the sessions of their power of awarding costs, which is a remedy only given them by the stat. 17 *G.* 2. upon appeal to the *next* sessions. With respect to the case of *Rex* v. *The Earl of Ashburnham* (*a*), which is the only decision to the contrary, it may be observed that it stands alone, and was decided prior to the cases last before cited: and in *Rex* v. *Justices of Berks* (*b*), it was decided that an appeal against an overseer's accounts verified and allowed, according to the stat. 17 *G.* 2., must be to the next sessions. Here it appears by the affidavit that the account was *verified* and allowed by two justices, which is a proceeding required by the stat. 17 *G.* 2. and not by the stat. 43 *Eliz.* 2dly, The appellant might have given notice of appeal on the same day that the account was allowed, and if he had so done, might have tried his appeal at the *Midsummer* sessions: but admitting that the time was too short to require that of him, he might by the practice of the sessions have entered and respited his appeal on the day of the sessions (16th *July*), and adjourned it for want of notice. He therefore came too late at the *Michaelmas* sessions.

Casberd, in support of the rule, maintained, 1st, That the time for appealing in this case was not restricted by the stat. 17 *Geo.* 2. [203] to the *next* sessions: 2d, That if it were, the *Michaelmas* sessions were the next sessions. On the first point, he relied on *Rex* v. *Lord Ashburnham*, as having decided this question; the circumstances of the present falling precisely within that case; and the allowance of the accounts being there, as here, by two justices, and verified by one overseer; so that the argument arising from that circumstance would have applied equally to that case. In *Rex* v. *The Justices of Berks* is is clear that the Court did not consider this clause of the stat, 17 *Geo.* 2. as a repeal of the clause of 43 *Eliz.*, by the distinction it took, that because the proceeding before them was under the stat. 17 *Geo.* 2., therefore the appeal could not be under the stat. 43 *Eliz.* However, the stat. 50 *Geo.* 3. *c.* 49. has done away that distinction by introducing a new mode by which overseers' accounts are to be allowed; so that now there can be no allowance under the stat. 17 *Geo.* 2. 2dly, The accounts were not allowed until the last day of giving notice. How then could the party appeal, in order to do which many previous steps are necessary, such as inspecting the allowance, and drawing notices, which must contain every matter of objection. [Lord *Ellenborough*, C. J.

(*a*) 2 *Nol. Poor Laws*, 2d edit. 221. (*b*) 1 *Bott.* 309.

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Though the party could not have appealed so as to have been heard, might he not have entered and respited the appeal?] In *Rex* v. *Coode, Ashhurst*, J. said that the next sessions meant the next possible sessions. It does not appear that *Bowles* had notice on the day of the allowance; and it will not be presumed that he had. This is not like the case of a poor's-rate, where a party must be presumed to have notice from the time of the publication in the church; for the allowance is not such a public act.

The Court took time to look into the case of *Rex* v. *Earl of Ashburnham*; and now [204]

Lord ELLENBOROUGH, C. J. delivered their opinion. It seems to the Court that in every view of the case the mandamus should go; whether this be a proceeding under the stat. 43 *Eliz.*, or under the stat 17. G. 3.; for, supposing it to be under the stat. 17 *Geo.* 2, and supposing that statute in this respect to have repealed the stat. 43 *Eliz.*, (which from the cases cited seems by no means to be settled,) still, under the circumstances of this case, we think the *July* sessions could not be considered the *next* sessions for the purpose of appealing; for the allowance by the justices was on the 8th of *July*, the last day when any effectual notice of appeal could have been given, and it does not appear when the appellant had any notice of such allowance (*a*). And the transaction seems to carry with it marks of design to defeat the appeal.

(*a*) Vide *Rex* v. *Justices of Sussex*, post, 206.

WRIGHT *against* PECKHAM and Another, Executor and Executrix (*b*).

Monday, Feb. 10th

After the return-day of the scire facias quare executionem non, &c. sued out by the defendants in [205] error, and a rule to appear, and a four-day rule to assign errors, served on the plaintiff in error; though judgment of non-pros. were entered up, and execution sued out, before the expiration of the rule to assign errors, yet if error were not assigned in time, the execution stands good.

THE defendants in error sued out a scire facias quare executionem non, &c., returnable in fifteen days of *St. Hilary;* and on the 30th of *January* entered with the clerk of the rules a rule to appear on the scire facias; at the expiration of which, viz. on the 4th of *February*, a rule to assign errors was served on the plaintiff; and on the 7th the plaintiff not having assigned his errors, the defendants entered up judgment on the scire facias, and took out execution thereon.

Best now moved to set aside the execution and restore the money levied thereon, on the ground that the defendants should have

(*b*) Note of *M.* and *S.*

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WRIGHT *against* PECKHAM, in Error.

waited till the time allowed by the rule to assign errors had expired, which was not until the 8th of *February;* for by giving that rule the defendants had precluded themselves from taking out execution until its expiration.

But *the Court* (*a*) held the execution regular; the plaintiff not having assigned his errors within the time allowed by the rule on the scire facias. And *Bayley*, J. adverted to the different language used in the two proceedings; in the first it was "Why the defendant in error should not have execution on the judgment;" but the other simply called upon the plaintiff in error to assign error, in order to enable the defendants in error to non pros. the writ of error, if not complied with.

Per Curiam, Rule refused *(b)*.

(*a*) *Le Blanc*, J. was absent, sitting on a special commission in *Horsemonger-lane*.

(*b*) Vide *Law and Pract. of Error*, 39, 40, 41.; and *Tidd's Pract.* 1136. 2d edit.

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Monday, Feb. 10th.

THE KING *against* The Justices of SUSSEX (*a*).

The party objecting to a poor's-rate may appeal to the next sessions for which he is in time to give an effectual notice of appeal after the publication of the rate; and one intervening day between such publication and the next immediate quarter sessions is not sufficient time for the purpose.

Several parties having a joint grievance, such as the omission of persons in the rate who ought to be rated, may join in giving one notice of appeal to the parish officers.

THIS was a rule calling on the defendants to shew cause why a mandamus should not issue, commanding them to cause continuances to be entered on the appeal of *W. Rickwood, G. Dawson*, and four others, against a poor's-rate for the parish of *Horsham*, in *Sussex*, to the next general quarter sessions, and at such sessions to hear and determine the same.

The affidavit of *Dawson*, one of the appellants, stated that on the 5th of *October* last a poor's-rate was allowed by two justices, and on the following day (*Sunday*) it was published in the parish church of *Horsham*. That the *Michaelmas* quarter sessions were holden at *Petworth* on the 8th of *October;* there being only one intervening day between the publication of the rate and the quarter sessions, which was too short a time to enable him to inspect the rate, to see if the inequalities existing in the former rate had been continued, and whether the property omitted in former assessments had been inserted in the rate, so as to determine the deponent whether or not to appeal against it at the said sessions. The affidavit of the attorney for the appellants also stated that after giving due notice of appeal to the several persons interested, the appeal was entered for trial at the last sessions held at *Chichester*, when after proof of the service of the notice, objections were taken; 1st,

(*a*) Note of *M.* and *S.*

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The KING *against* The Justices of SUSSEX.

That the appeal was out of time, because not lodged at the *October* sessions preceding; 2dly, That notices * of appeals should have been separately given by each appellant, and not one conjoint notice. That the Court determined the notice bad on both grounds; and upon this confirmed the rate with costs. The notice given was signed by the six appellants, and stated the causes of appeal: 1st, That several persons (nominatim) were not in any manner rated for the lands, &c. occupied by them; 2dly, That several persons (nominatim) were rated at much less, and not enough in proportion with the appellants, for the premises in their occupation. *Petworth* is distant from *Horsham*, where the appellants resided, about eighteen miles. [*207]

The affidavit of the parish officers opposing the rule stated that in the evening of the 6th of *October*, after the rate was published in the church, a vestry was held, at which two of the appellants were present, and no application was then made by them to inspect the rate.

Courthope and *Roe* shewed cause. 1st, The appeal was out of time. It appears that some of the appellants attended the vestry held on the evening of the publication, and did not require to inspect the rate at the time, which they ought to have done if they meant to use due diligence in making their appeal.

Lord ELLENBOROUGH, C. J. asked why the parish officers made their rate so close upon the time of the sessions; it appeared as if they had done it with a view of ousting the parties of their appeal. The Court had decided that morning that the *next* sessions meant the next practicable sessions at which an effectual appeal could be lodged (*a*). If by the late publication of the rate the parties are driven into such a narrow point of time as not to be able to make an effectual appeal at the next sessions, those must be considered the *next* when such appeal can be made effectually. [208]

They then objected, 2ndly, that the appellants should not have given a joint but separate notices. The notice states that several persons are rated in a less proportion than the appellants, which is a grievance affecting each separately, and entitling each to a separate appeal, and requiring perhaps in respect of each a separate remedy: but if there ought to have been separate appeals, there ought to have been separate notices.

D'Oyley, in support of the rule, contended on the second point, that the first cause of appeal stated in the notice, viz. the omission of certain persons in the rate, was at all events a joint grievance affecting all the appellants in an equal degree; and relied on the

(*a*) *Rex* v. *Justices of Dorset*, ante, 200.

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case of *The King* v. *White* (*a*) as an authority to shew that parties who have several grounds of complaint may notwithstanding join in an appeal against a poor's-rate.

Lord ELLENBOROUGH, C. J. said, that he thought that case which had been much considered was authority sufficient to support the present appeal.

Per Curiam, (*b*). Rule absolute.

(*a*) 4 *Term Rep.* 771.

(*b*) *Le Blanc*, J. was sitting on the special commission in *Horsemonger-lane*.

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Monday, Feb. 10th.

ANTRAM, Assignee of HAWKES, a Bankrupt, *against* CHACE and Others.

Where in an action by the assignee of a bankrupt the petitioning creditor's debt was to be proved by a deed of reference between himself, the bankrupt and others their partners, of all accounts between them, or any two of them, and by an award (inter alia) of a separate debt of above 100*l.* due from the bankrupt to the petitioning creditor, who was also the assignee; held that it was not sufficient to prove the execution of the deed by the petitioning creditor and the

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bankrupt, without proving also the execution by the other partners, (by whom it appeared on the face of it to have been also executed;) for the consideration to each to execute his own submission was the submission of all the others, and, without proof of that the arbitrators had no authority to make their award between any of the parties.

IN this action of trover and conversion of goods in the time of the bankrupt, and in the time of the assignee, which was tried before *Graham*, B. at *Winchester*, the sole question made was upon the debt of the petitioning creditor, the present plaintiff, and that depended upon the validity of an award. *Antram*, the plaintiff, *Hawkes*, the bankrupt, and two other persons were engaged as partners in some government victualling contracts for the supply of the king's troops; and the accounts amongst themselves becoming involved, they entered into a deed of covenant, as was alleged at the trial, that the copartnership accounts and all matters in difference between the parties, or any two of them, should be referred to two certain arbitrators; who afterwards made their award, in which they found the several sums due to and from the partnership account by each of the partners (the balance of that account being in favour of *Antram*); and then they found a separate sum due from *Hawkes* to *Hendy*, one of the partners, and another separate sum of 83*l.* 3*s.* due to *Antram* on the partnership account, and a further separate sum of 120*l.* due from *Hawkes* to *Antram* on account of the costs of a suit in Chancery, which was also expressly included in the reference, (arising in fact out of partnership dealings,) besides another separate sum due to *Antram* from another of the partners on the last-mentioned account. In proof of this case the plaintiff's counsel at the trial put in the deed of covenant, the substratum of the award, which appeared on the face of it to have been executed by all the partners, but were only able to prove the

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execution of it by *Antram* and *Hawkes*. Whereupon it was objected that the award could not be received in evidence for want of proving the deed executed by all the partners; the execution of each being presumed to be effected upon the supposition that all the rest were to be equally bound with himself. It was urged for the plaintiff that the terms of submission, including not only the partnership accounts, but all matters in difference between the parties, particularly the costs of a bill in Chancery which had been filed by *Antram* against *Hawkes* and another of the partners, (the fourth partner having before become bankrupt) and which was withdrawn on this reference, must be taken not only as a joint but as a several authority from each; and therefore as against *Hawkes*, who was found to be indebted in a separate sum to the plaintiff, it was sufficient to prove the execution of those two parties. But the learned Judge, being of opinion that the objection was well founded, consulted the plaintiff.

F. Pollock moved in the last term to set aside the nonsuit, on the same ground on which the plaintiff's case was put at the trial; which he contended was evidenced by the deed and the award: the one referring, and the other adjudicating upon, separate as well as joint accounts between the parties. *The Court* asked whether there was any evidence of *Hawkes* having attended upon the examination of the matter before the arbitrators: and being answered that the inquiry at the trial did not proceed so far, but that the plaintiff's counsel were prepared with evidence that all the parties had attended; they still reluctantly granted a rule to shew [211] cause; Lord *Ellenborough*, C. J. saying that *Hawkes* might have attended upon the understanding that the others had executed the authority by which they were to be bound as well as himself, and which might be his sole inducement for agreeing to the reference.

Burrough and *A. Moore* now shewed cause. The arbitrators had no authority to proceed upon the reference till all the parties had executed the submission, which upon this evidence it must be taken that they had not done: and it cannot be supposed that either party would have agreed to refer his separate account with the other, unless the joint accounts were also referred. The petitioning creditor's debt must be a legal debt, which could not be shewn in this case without proving that the arbitrators had a legal authority to award between the parties. Partners, as such, cannot be debtor and creditor one to the other until their accounts are liquidated. This, therefore, is not like the case of joint and several obligors of a bond, each of whom is severally as well as jointly indebted to the obligee.

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Dampier and *F. Pollock*, contrà, said that there was no reason why two of several partners might not agree to refer their several interests, so as to bind themselves: and if that could be done by a separate deed between the two, it might as well be done by a deed purporting to be between all, and upon their joint and several accounts, though executed only by those two. [Lord *Ellenborough*, C. J. Can this be considered as any other than a conditional, and not an absolute authority from each; that is, that all the partners [212] should equally bind themselves? If this were to bind *Hawkes*, he might lose the benefit of the submission of all the others, which might have been his inducement to submit the matters in difference between him and *Antram*.] Though the others had not gone before the arbitrators, yet these two might have agreed to proceed upon the inquiry without them. [*Bayley*, J. How can it be taken, under the circumstances of this case, that *Hawkes* knew that the others had not executed it: without which no such inference can be drawn.] Not only the covenant, but the reference also is several as well as joint.

Lord ELLENBOROUGH, C. J. This was a reference of the aggregate accounts between all and each of these partners, and the consideration to each for entering into the submission was that each party's account should be liquidated not only as to one but as to all; that each should have a termination of all accounts with all: and they mutually stipulated with each other that the arbitrators should liquidate not only partnership accounts, but also separate accounts between any two of them. Now here the arbitrators were not shewn to be armed with authority to decide the whole question between the parties. There is, I believe, a case in *Yelverton* (*a*) to this effect, but the principle is so strong that it wants no authority to support it, that there should be the accession of all the parties to the common agreement of all, which is the consideration to each for entering into the agreement; and, therefore, I think the nonsuit was right.

The other Judges (*b*) concurring,

Rule discharged.

(*a*) Qu. *Soprani* v. *Skurro*, *Yelv.* 18.

(*b*) *Le Blanc*, J. was sitting on the special commission in *Horsemonger-lane*.

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Monday, Feb. 10th.

SMITH *against* JOHNSON (*a*).

Disputes existing between the master and owner of a ship touching the ship's accounts on a certain voyage, they referred all actions and causes of action to arbitrators, who awarded a balance to be paid by the owner to the master: held that upon a rule for an attachment for non payment of the sum awarded, it was not competent to the owner to claim a deduction of a certain sum, the price and proceeds of certain goods shipped on their joint account, the whole of [214] which price had been paid by the owner in the first instance, on the ground that that particular adventure formed no part of the disputes between them, and had not been submitted to nor taken into the consideration of the arbitrators; because it was plainly within the terms and scope of the reference, the direct object of which was to make a final settlement of all matters of account between the parties; and it was the owner's own fault if he kept back that item of the account.

THE plaintiff being master, and the defendant owner of the ship *Lustre*, bound on a voyage to *Jamaica*, agreed to ship goods on their joint account and expense, to be disposed of there, and that the proceeds should be accounted for by the plaintiff. The defendant thereupon purchased the goods, and paid the whole price for them. After the ship's return, disputes having arisen between them touching the ship's accounts, the parties by their several bonds referred all manner of actions and causes of action to two arbitrators, who thereupon awarded the defendant to pay to the plaintiff 223*l.* 10*s.* 4*d.* in full of all accounts, claims, and demands whatsoever due from the defendant to the plaintiff, and that the plaintiff should accept the same in full accordingly, and that thereupon all differences and disputes subsisting between the parties should finally cease and determine. A rule nisi for an attachment against the defendant for non-payment of the sum so awarded having been obtained;

Campbell insisted that the defendant was entitled to a deduction of 72*l.* 9*s.*; which sum the affidavit of the defendant stated to be the amount of a moiety of the price of the goods invested and the proceeds thereof, for which the plaintiff had never accounted, though the investment had been disposed of by him in *Jamaica*; and that the said deduction had not been submitted to or made the subject of claim before the arbitrators, nor did it form any part of their award. He relied on *Ravee* v. *Farmer* (*b*), which was decided on the authority of *Golightly* v. *Jellicoe* (*c*), where the Court held that an award made upon a reference of all matters in difference did not preclude the party from suing on a subject matter of difference then subsisting, but not taken into consideration by the arbitrator, and *not included in the matters referred.* [Lord *Ellenborough*, C. J. observed that the latter words formed a distinction very important in that case.] He cited also the *Digest*, lib. 4. tit. 8. sect. 43.

Lord ELLENBOROUGH, C. J. Here is a reference of all matters

(*a*) Note of *M.* and *S.*

(*b*) 4 *Term Rep.* 147.

(*c*) *Ib.* in notis; and vide *Seddon* v. *Tutop*, 6 *Term Rep.* 610.

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in difference, and it appears that the subject in respect of which the deduction is now claimed was a matter in difference at the time, and within the scope of the reference: notwithstanding which the defendant contends that he was not obliged to bring forward the whole of his case before the arbitrators, but might keep back a part of it in order afterwards to use it as a set-off. But it was competent to him to have brought the whole under the consideration of the arbitrators; and therefore without deciding against the authority of *Golightly* v. *Jellicoe*, or the case cited from the civil law, I think that where all matters in difference are referred, the party as to every matter included within the subject of such reference ought to come forward with the whole of his case.

GROSE J. concurred.

[215] BAYLEY, J. (*a*). The defendant, in order to entitle himself to claim this deduction, should have shewn that it was not a matter in difference at the time of the reference, or that the arbitrators could not have taken it into their consideration.

Marryat was to have argued in support of the rule.

Per Curiam, Rule absolute.

(*a*) *Le Blanc*, J. was sitting upon the special commission at *Horsemonger-lane*.

Monday, Feb. 10th.

POPLE and Another *against* WYATT (*a*).

The plaintiff may abandon an attachment obtained against the sheriff, and take an assignment of the bail-bond and proceed thereon.

THIS was a rule calling on the plaintiffs to shew cause why the bail-bond should not be delivered up to be cancelled, and proceedings had thereon set aside for irregularity, with costs, on the ground that an assignment thereof had been taken after an attachment granted against the sheriff.

Puller shewed cause on the affidavit of the sheriff's officer, that on the attachment being lodged, he prevailed on the plaintiffs to withdraw it, and take an assignment of the bail-bond, which the plaintiffs, in order to relieve the sheriff, accordingly took, and commenced an action thereon.

E. Lawes supported the rule on the ground that the plaintiffs, by suing out an attachment, had made their election to proceed [216] against the sheriff, and could not therefore afterwards take an assignment of the bail-bond, although the sheriff might have proceeded on it.

(*a*) Note of *M.* and *S.*

The Court (*a*) held that the plaintiffs might abandon their attachment in this case, and then take an assignment, and proceed on the bail-bond.

Rule discharged with costs.

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POPLE *against* WYATT.

(*a*) *Le Blanc*, J. absent as before.

BROWN and Others *against* MAFFEY (*a*).

Monday, Feb. 10th.

THIS was an action by the plaintiffs, as indorsees, against the defendant, as indorser of a bill of exchange drawn by one *Whitmarsh*, dated the 16th of *April* 1809, upon Messrs. *Neave*, for 500*l.* payable to the drawer's own order two months after date, and accepted by the *Neaves;* which bill was afterwards indorsed by *Whitmarsh* to one *Fiander*, by whom it was indorsed to the defendant, and by him to *Cosier*, by *Cosier* to *Woods*, and by *Woods* to the plaintiffs. At the trial before *Bayley*, J. at the last *Wiltshire* assizes, it appeared in evidence that *Whitmarsh* drew the bill for the accommodation of *Woods:* that he had no effects in the hands of the drawees; and that he had not received any value for his indorsement: that *Fiander*, *Cosier*, and the defendant, who had in like manner indorsed the bill for the accommodation of *Woods* had not received any value for their indorsements. *Woods* had discounted the bill with the plaintiffs, who were bankers. The defendant knew that *Cosier* had received no value for his indorsement, but it was not proved, that at the time when the defendant indorsed the bill he knew that *Whitmarsh* the drawer had no effects in the hands of the drawees. The plaintiffs not having given notice to the defendant of the dishonor, and the learned Judge thinking such notice material to the defendant with respect to his remedy over against *Woods*, directed a nonsuit, with liberty to the plaintiffs to move to set it aside and enter a verdict for the amount of the bill, if the Court thought him entitled to recover without such notice. A rule nisi was accordingly obtained for this purpose in *Michaelmas* term last by *Pell*, Serjt., who cited the cases of *De Berdt* v. *Atkinson* (*b*), and *Sisson* v. *Thomlinson* (*c*), and *Corney* v. *Mendez Da Costa* (*d*).

Burrough and *Selwyn* now shewed cause against the rule, and contended that the indorser of the bill, not knowing that in its original formation it was an accommodation bill, was entitled to

Where a bill was drawn, accepted, and indorsed by several indorsers, for the accommodation of the last indorser, and the acceptor had no effects of the drawer in his hands, but that fact was not known to the defendant, one of the prior indorsers; held that the defendant was entitled

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to notice of the dishonor, before the holder could maintain an action against him, in order to enable him (even if he had no remedy upon the bill) to call immediately upon the last indorser, to whom, in fact, he had lent the security of his indorsement, without value received, and who had, in fact, received the money upon that security.

(*a*) Note of *M.* and *S.*
(*b*) 2 *H. Bl.* 336.
(*c*) *Selwyn's N. P.* 291.
(*d*) 1 *Esp. N. P. Cas.* 302.

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notice of the dishonor, though he himself had not given or received value for it; and that the cases cited did not dispense with the notice in the case of an indorser, as this defendant was, not knowing that it was an accommodation bill in its inception. The rule as to notice stands on a different foundation, as it respects the drawer, and as it respects the indorser. The necessity of notice to the drawer proceeds on the presumption that he has effects in the hands of the drawee, and is intended, in case of the bill's being dishonored, to give the drawer an opportunity of withdrawing his effects from the drawee. This rule prevailed until accommodation paper sprang up, when the exception was established, which dispensed with such notice where the drawer had no effects in the drawee's hands from the time the bill was drawn until it became due. The exception was established for the first time by a solemn decision in *Bickerdike* v. *Bollman* (*a*); although *Buller*, J. there refers to a case in which he had before decided the same point at nisi prius; which decision, he adds, had been acquiesced in. But that exception, though founded in good sense, has been the frequent subject of regret ever since; by *Eyre*, C. J. in *Walwyn* v. *St. Quintin* (*b*): by Lord *Alvanley* in *Clegg* v. *Cotton* (*c*); and by Lord *Ellenborough* in *Orr* v. *Maginnis* (*d*.) In the latter case his Lordship said, "the case of *Bickerdike* v. *Bollman* went on the ground that the drawer had no effects in the hands of the drawee *at the time of the bill drawn;* and the other cases followed on the same ground; but no case has gone the length of extending the exemption further to cases where the drawee had effects of the drawer in his hands at the time of the bill drawn, though the balance might vary afterwards, and be turned into the opposite scale: and I know that it has been a subject of regret with the very learned person who was counsel for the plaintiff in that case, that the old rule requiring notice to be given in all cases to the drawer of the non-acceptance of his bill was so far broken in upon: *but I shall anxiously resist the further extension of the exemption.*" But the ground on which the indorser is entitled to notice is thus stated by *Buller*, J. in *Tindal* v. *Brown* (*e*) "The purpose of giving notice is not merely that the indorser should know that the note is not paid, for he is chargeable only in a secondary degree; but to render him liable, you must shew that the holder looked to him for payment, and gave him notice that he did so. There is no prescribed form of notice; yet it must import that the holder considers the indorser as liable, and expects payment from him,

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(*a*) 1 *Term Rep.* 405. (*b*) 2 *Bos. & Pull.* 654.
(*c*) 3 *Bos. & Pull.* 241. (*d*) 7 *East*, 359. (*e*) 1 *Term Rep.* 170.

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that he may have his remedy over by an early application." This rule requiring notice to the *indorser* was not dispensed with at so early a period as the rule requiring notice to the *drawer*. Lord *Kenyon* in *Wilks* v. *Jacks* (*a*), which was decided in *December* 1793, says, "that the rule dispensing with notice extended only to actions brought against the drawer: the *indorser* was in all cases entitled to notice; for he had no concern with the accounts between the drawer and acceptor." The first case where notice to the *indorser* was dispensed with was *De Berdt* v. *Atkinson* (*b*): but the question there arose upon an indorsed promissory note, where the indorser stands in the place of the drawer of a bill of exchange (*c*); and the indorser there knew at the time of the insolvency of the drawer; so that that decision was a mere application of the rule which had been previously laid down in *Bickerdike* v. *Bollman*. In the case of *Sisson* v. *Thomlinson* (*d*) which followed, it must be admitted that notice to the indorser of a bill of exchange was dispensed with; but that decision proceeded principally upon the knowledge of the indorser that the drawer had no effects in the hands of the drawee; which does not exist in this case. The Court therefore will not deem it expedient to extend the dispensation of notice to a new case, after the introduction of that dispensation in any case has been so much regretted.

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Pell, Serjt. and *A. Moore*, in support of the rule, contended that there was not any valid distinction between the present case, and those of *De Berdt* v. *Atkinson*, and *Sisson* v. *Thomlinson*; and that the mere circumstance of want of knowledge as to the bill having been originally an accommodation bill was not material. But admitting it to be so, the jury might have inferred from the facts in this case that the indorser did know that the drawer had no effects in the hands of the drawee; for it appeared in evidence that it really was an accommodation bill; that the defendant had given no value for it; and that *Cosier* had declared, in the presence of the defendant, that he had indorsed the bill merely for the accommodation of *Woods*. They admitted that *Smith* v. *Becket*(*e*), was the case of an accommodation indorsement where notice had been held necessary; but there the bill, which had been made payable on demand, had been deposited by the drawer with his bankers as a security for six months, at the end of which time the

(*a*) *Peake's N. P. Cas.* 202. (*b*) 2 *H. Bl.* 336.

(*c*) See the opinion of Lord *Mansfield*, C. J. in *Heylyn* v. *Adamson*, 2 *Burr.* 676.

(*d*) *Selwyn's N. P.* 291. (*e*) 13 *East*, 187.

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bankers had renewed their advances without the knowledge or consent of the indorser. Here, they contended, that there being express proof that the drawer drew, and that the defendant indorsed the bill without value, no action could be maintained by the latter upon the bill, whatever other remedy over against *Woods* he might have. [To which Lord *Ellenborough*, C. J. observed, that if the indorser without value paid the bill, he would undoubtedly
[221] have a remedy over either upon the bill; (for it did not appear that the defendant knew that the acceptor had accepted without consideration;) or for money paid to the use of the person to whom he lent his indorsement. And then the question was whether the defendant might not be considered as a co-surety for *Woods*; and if so, whether he was not entitled to notice of the non-payment by the acceptor, by which he was rendered liable to the holder, in order to pursue his remedy over immediately against *Woods*.]

Lord ELLENBOROUGH, C. J. The doctrine of dispensing with notice of the dishonour of a bill, (which notice is generally so convenient to commerce,) has grown almost entirely out of the case of *Bickerdike* v. *Bollman*; and though there may have been previous decisions to the same effect at nisi prius, yet none had been brought in revision before the Court till that case. That decision dispensed with notice to the drawer where he knew beforehand that he had no effects in the hands of the drawee, and had no reason to expect that the bill would be paid when it became due. But that exception must be taken with some restrictions, which since I sat here I have often had occasion to put upon it; as where a drawer, though he might not have effects at the time of the drawing of the bill in the drawer's hands, has a running account with him, and there is a fluctuating balance between them, and the drawer has reasonable ground to expect that he shall have effects in the drawee's hands when the bill becomes due: in such cases I have always held the drawer to be entitled to notice, because he draws the bill upon a reasonable presumption that it will be honored (*a*). Where indeed it is a mere accom-
[222] modation bill, without assets in hand or any expected, no notice to the drawer is necessary according to the established authorities: but I should be sorry to extend the doctrine further. It is said however that I extended it to the case of an indorser in *Sisson* v. *Thomlinson*. But without surrendering that case, the circumstances of which were different from the present, and may make it at least more questionable; here it is clear that the defendant had no

(*a*) Vide *Orr* v. *Maginnis*, 7 *East*, 359. and *Legge* v. *Thorpe*, 12 *East*, 171.

knowledge of the acceptor's having no assets of the drawer in his hands, and that the drawer put his name to it merely as a co-surety for *Woods;* and therefore when it was dishonored, it became most material to the defendant that he should have had notice in order to enable him to proceed against *Woods*, for whom he was in substance, though not in form, a surety; for if he had no notice, he might lose his benefit of reimbursement against *Woods*, who had received the money upon the security of the defendant. I therefore think that the nonsuit was proper for want of such notice.

GROSE, J. concurred.

BAYLEY, J. (*a*) I am of the same opinion. The foundation of Mr. J. *Buller*'s opinion in *Bickerdike* v. *Bollman* was this, that the drawer, having no assets in the drawee's hands, could not be injured by the non-payment of the bill, or the want of notice that it had been dishonored: and that is true as against the drawer; but as against an indorser, who is not the party to provide for taking up the bill in the first instance, and who has a remedy over, the want of notice is an injury to him. In *Corney* v. *Mendez Da Costa* (*b*), it would have been a fraud in the indorser to call upon [223] the maker of the note, because before it became due the maker had deposited effects in his hands to answer the amount of his indorsement, and therefore he had no right to complain of the want of notice. But in this case, if the defendant had had notice of the nonpayment at the time, he would have been enabled to call upon *Woods* immediately. The case of *Smith* v. *Becket* has established that a party does not wave his right to notice by lending his indorsement as a security to enable the drawer to raise money on it.

Rule discharged (*c*).

(*a*) *Le Blanc*, J. was absent as before. (*b*) 1 *Esp. N. P. C.* 302.
(*c*) Vide *Nicholson* v. *Gouthitt*, 2 *H. Blac.* 609. and *Esdaile* v. *Sowerby*, 11 *East*, 114.

CALTON *against* BRAGG.

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THE plaintiff declared upon the common counts for goods sold and delivered, for money *lent*, money paid, money had and received, and also upon a count for the interest due to him for the forbearance of sums of money before then lent and advanced by

Interest is not allowable by law upon money lent generally, without a contract for it expressed, or to be implied from the usage of trade, or from special circumstances, or from written securities for the payment of principal money at a given time.

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him to the defendant, and paid, laid out and expended for his use, and had and received by the defendant to the use of the plaintiff, &c. It was stated at the trial before *Bayley, J.* at *Dorchester*, that there had been a running account between these parties, in the course of which the plaintiff had supplied the defendant with goods, and had also lent him several sums at different times, to the extent on one occasion (as it was now stated in court) of 100*l.*; the balance of the account however had been paid by the defendant to the plaintiff for the goods sold and for the money lent, but not for interest on the latter; which balance the plaintiff had received, saving his claim for interest, to recover which this action was brought; and the learned Judge directed the jury to find for the plaintiff for the amount of the interest proved, which was £35.; reserving the question for the opinion of the Court, whether interest was by law due or could be recovered in such a case; and the defendant's counsel had liberty to move to set aside the verdict and enter a nonsuit. This motion was accordingly made by *Burrough* in last *Michaelmas* term, and a rule to shew cause granted; *Bayley, J.* at the same time observing that there was no evidence of any course of dealing between the parties from whence it might be inferred that interest was tacitly agreed to be taken.

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Gaselee and *Moysey* now showed cause against the rule, and contended that interest ran upon money lent, though there was no contract express or implied for that purpose; because the lender would otherwise lose the benefit which he might make of his capital in the mean time, for the accommodation of the borrower; and the lender ought in equity to be put in the same situation as if he had applied his principal to his own use. In *Vernon* v. *Cholmondeley* (*a*) the Court of Exchequer all agreed that the jury might give interest on promissory notes, bills of exchange, and for money lent. The same was held in *Blaney* v. *Hendricks* (*b*) where the rule for allowing interest was extended to all liquidated sums; though the balance there arose upon an account stated for money due for goods sold and delivered. Lord *Hardwicke* had before allowed interest upon an account stated, in *Barwel* v. *Parker* in 1751 (*c*); and this Court gave it upon money lent to the time of the judgment in *Robinson* v. *Bland* (*d*). In *Trelawney* v. *Thomas* (*e*) it was given upon money advanced for the use of another: and *Gould, J.* there recognized the general rule to allow

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(*a*) In 1722. *Bunb.* 119.
(*b*) In 1771. in *C. P.* 2 *Blac.* 761. and 3 *Wils.* 205. (*c*) 2 *Ves.* 365.
(*d*) In 1760. 2 *Burr.* 1077. 1085—8. (*e*) 1 *H. Blac.* 303.

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interest upon money lent both at law and in equity. 14 *Vin. Abr.* 458. tit. *Interest* C. refers, amongst many others, to a case of *Ashton* v. *Smith* in 1726, where interest was decreed for the yearly balance of a renewing account. [Lord *Ellenborough*, C. J. That looks like an agreement for interest, to be collected from the acts of the parties on prior accounts stated. But is it ever allowed except upon securities for money payable at a certain day, or by agreement express or implied? Was it ever given upon a covenant for rent? In one case where arbitrators had awarded it upon a sum to be paid, the Court set it aside.] In *Farquhar* v. *Morris* (*a*) it was referred to the Master to compute interest as well as principal upon a bond for a certain sum generally, without maming any certain day of payment, and though interest was not expressly reserved, which is usually done in such instruments: how then can it make any difference where money is lent generally, without writing? [Lord *Ellenborough*, C. J. The money was due on the bond immediately, no future day being given.] The recent cases of *De Havilland* v. *Bowerbank* (*b*), and *De Bernales* v. *Fuller* (*c*) where interest was refused, were actions for *money had and received* to the use of the plaintiff; but that is different from money actually lent by him to the defendant.

Burrough, contrà. There is no more reason why interest should run, without an agreement for that purpose, upon money lent, than upon money had and received, where it is now admitted not to run: the difference is merely technical and verbal. In many of the earlier cases cited there must have been other circumstances, not stated in the books, from whence the courts collected the intention of the parties that interest should run. In *Robinson* v. *Bland* that intention was collected from the fact of a bill of exchange having been given for the money lent, which always carries interest, though the bill was void in law. In other cases it has been collected from the acts or declarations of the parties, or from the usage of trade (*d*). The Master of the Rolls in *Parker* v. *Hutchinson* (*e*), upon the information of Lord *Kenyon* in 1796, states the rule as then acted upon at *Guildhall* to be only to allow interest on promissory notes and other written securities for money payable at a certain day; or (as he adds in *Upton* v. *Lord Ferrers* (*f*),) payable on demand, from the day of the demand; and such has long been the general understanding.

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(*a*) 7 *Term Rep.* 124.
(*b*) 1 *Camp. N. P. Cas.* 50.
(*c*) 2 *Campb.* 426.
(*d*) Vide *Eddowes* v. *Hopkins*, *Dougl.* 375.
(*e*) 3 *Ves.* 133.
(*f*) 5 *Ves.* 803.

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LORD ELLENBOROUGH, C. J. It is not only from decided cases, where the point has been raised upon argument, but also from the long continued practice of the courts, without objection made, that we collect rules of law. Lord *Mansfield* sat here for upwards of 30 years, Lord *Kenyon* for above 13 years, and I have now sat here for more than 9 years; and during this long course of time no case has occurred where, upon a mere simple contract of lending, without an agreement for payment of the principal at a certain time, or for interest to run immediately, or under special circumstances
[227] from whence a contract for interest was to be inferred, has interest been ever given. The mere form of the count cannot make any differemce in this respect; for in most cases it happens that a plaintiff may either frame his count for money had and received, or for money lent. If interest were due in this case, why should it not also be due where goods are to be paid for at a certain day, when that time arrives, as Baron *Montagu* in one of the old cases is stated to have held; or in any other case where money is to be paid at a certain day? Those cases press closely upon the present. If there were any general rule for interest to run upon money due, why should it not be allowed upon all book debts? Juries would give ear readily enough to such a direction: but I dare not vary from the practice which has long prevailed in all the courts of *Westminster-hall*. If it be fit that the whole course of our proceedings in respect to giving interest should be recast, it must be done by act of parliament. Where one directs his agent to advance money to another, what difference can it make as to the point of interest, whether he afterwards counts for money had and received, or for money lent. If interest were demandable generally upon money due, why should it have been thought necessary to introduce, as it has prevailed in practice, a particular count for interest agreed to be paid where the law would have given it without such an agreement. But in fact there has been no instance of its being allowed except upon written securities for the payment of money at a given time, or upon an express or implied agreement for it. The judgment of Lord *Mansfield* in the case of *Robinson* v. *Bland*, and of the eminent Judges who sat with him, shews that interest is not due without a contract for it; for they would never have
[228] resorted to the argument of intention to be collected from the giving a void bill of exchange, in order to support the claim of interest, if the law would have given it without, upon the mere loan of money. Where a balance has been settled upon an allowance of interest in a banker's books, that is an admission by the party of a contract to pay interest on the sums advanced to him by

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the banker. The cases in equity also shew the understanding which has prevailed upon this subject not only in those courts, but also in the courts of law: as Lord *Alvanley*, when Master of the Rolls, states in *Parker* v. *Hutchinson*, that he had received the rule there laid down from Lord *Kenyon*, as derived from the practice adopted at the sittings at nisi prius. It was said indeed in *Blaney* v. *Hendrick* that interest is due upon all *liquidated sums* from the instant the principal becomes due and payable(*a*). But those words must be taken in a restricted sense, and I must understand by them something more than an account stated. If an account be stated, and the nature of the transaction be such as to afford evidence of an agreement for interest, as if it be shewn to have been allowed before upon a prior settlement of accounts, then it may be warranted. But if it be understood as extending the claim of interest upon money lent generally, without any certain time of payment, or any agreement for interest expressed or to be implied, I shall expect a body of authorities more strong and consistent [229] than has yet been brought forwards before I can venture to say that it is allowable by law. Hitherto it has only been allowed upon written contracts express or implied for the payment of interest. If it be fit that the rule should be carried further, it must be done by the legislature.

GROSE, J. The question is whether upon money lent generally interest is to be given? If it be, from what time is it to run: from the receipt of the money by the borrower, or from the time of the demand made by the bringing of the action? During all my experience I have never known interest given upon money lent, or upon money due for goods sold, or in any other case but upon a contract for interest expressed or implied. It is the lender's own fault if he do not contract for interest when he advances the money; but the law has long been settled as I have stated. Why should interest be paid at all without a contract for it? If there be no proof of contract, it might be given against the intention of the parties at the time of the loan. If they did not then contract for interest, it shews that they did not mean to reserve it. To

(*a*) It is so stated in the report of the case in 2 *Blac.* 761. But the statement in 3 *Wils.* 206. is that "upon an account stated between merchant and merchant, it shall carry interest from the time it was liquidated:" which is more plainly referable to an implied contract by the usage of trade. See also *Pinock* v. *Willett*, *M.* 7 *G.* 2. *Barnes*, 228, where, in an action for goods sold and delivered, the jury, upon the execution of a writ of inquiry, had allowed interest for the balance of the account due to the plaintiff: but the Court were of opinion that the inquisition should be set aside.

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allow interest therefore in this case would be inconsistent with the practice which has long prevailed in *Westminster-hall*, and to the general understanding of mankind upon the subject: it would not be reasonable but unjust: there is uniform usage ageinst it, and the claim is unauthorized by law.

BAYLEY, J. (*a*) I entirely agree with the rest of the Court. [230] Actions for money lent are continually brought; and if any instance had occurred in which interest had been allowed, it would have been adduced: and none having been stated shews that the constant practice has been to disallow it.

Rule absolute for entering a nonsuit.

(*a*) *Le Blanc*, J. was absent as before.

Monday, Feb. 10th.

LEE and Another, Assignees of HILL, a Bankrupt, *against* LOPES, Bart. (*a*)

A tenant having committed an act of bankruptcy in *October* 1810, upon which a commission issued on the 21st of *January* 1811, and the sheriff having on the 7th of *January*, levied an execution at the suit of the landlord for a judgment debt of 600*l.*, under which he sold the goods of [231] the tenant on the 21st and 22d of *January*, for 520*l.* and out of that sum when received, paid the landlord 140*l.* for one year's rent in arrear: held, in an action for money had and received, brought by the assignees of the bankrupt tenant against the sheriff to recover the whole amount of the sum levied, that the property in the goods being changed by the act of bankruptcy and commission, and transferred to the assignees, it lay upon the sheriff to prove that he had paid over the money to the landlord and execution creditor before he had notice of the commission issued; and not giving such proof, that he was liable for the amount to the assignees; and that he was not entitled to deduct the 140*l.* paid over to the landlord, as for the year's rent in arrear, under the stat. 8 *Ann. c.* 14. *s.* 1., a commission of bankrupt not being an *execution* within the meaning of that statute, which directs that no goods upon demised premises shall be taken by virtue of any *execution*, unless the execution creditor shall, *before the removal of such goods from off the premises*, pay to the landlord all arrears of rent not exceeding a year's rent.

THIS was an action brought against the sheriff of *Devon* for money had and received to the use of the plaintiffs, which was tried before *Graham*, B. at the last assizes at *Exeter*. At the trial, the petitioning creditor's debt was proved, the trading, an act of bankruptcy on the 17th of *October* 1810, a commission issued on the 21st of *January* 1811, and the assignment to the plaintiffs on the 23d of *February*. Also the sheriff's officer proved the writ of execution returnable on the 23d of *January* 1811, and the warrant to levy on a judgment against the bankrupt at the suit of *James Edwards*, 600*l.* and 80*s.* damages. On the 7th of *January* the sheriff levied, and on the 21st and 22d the goods were sold, and the proceeds, amounting to 520*l.* 11*s.* 8*d.*, paid to the under-sheriff, who afterwards paid *Edwards* the landlord 140*l.* for one year's rent to *Midsummer* preceding. The sheriff claimed this sum as a deduction; and *Graham*, B. at the trial inclining to think that a commission of bankrupt might be deemed an *execution* within the equitable construction of the stat. 8 *Ann. c.* 14., so as to entitle the sheriff to this deduction, a verdict was thereupon taken for

(*a*) Note of *M.* and *S.*

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the plaintiffs for the sum levied, after deducting the rent paid; with liberty for the plaintiffs to move the Court to add 140*l.* to the damages, if the Court should think that the year's rent to the landlord was unduly paid. A rule nisi for that purpose was accordingly obtained by *Horner* in the last term; when Lord *Ellenborough*, C.J. said that a commission of bankrupt had been sometimes called a statutable execution: but though it might be said to be similitudinary to an execution, it was not an execution.

Lens, Serjt. and *Dampier* now shewed cause, and contended that the sheriff had a right to return the 140*l.* paid over to the landlord. The latter was entitled to distrain for his rent as long as the goods remained on the premises, notwithstanding the title to them was changed by the bankruptcy because the goods are liable in respect of the place where found, and not of the person to whom they belong. It was so decided in a case ex parte *Plummer* (*a*); and conformably to that decision it was held in *Buckley* v. *Taylor*(*b*) where the goods of a tenant, who had become bankrupt, were sold under the commission upon the premises, and the landlord bought a part of them, that he might retain the amount of the half-year's rent due to him out of the price due for the goods. In this case the plaintiffs, who are the assignees, could not have removed the goods of the bankrupt from off the premises, without satisfying the landlord his [232] year's rent; for a commission of bankrupt is an execution in the first instance, and falls within the equity of the stat. 8 *Ann. c.* 14.; and was so considered by the Lords Commissioners of the Great Seal in a case cited by the Lord Chancellor in giving judgment in the above-mentioned case ex parte *Plummer*. If that be so, the plaintiffs cannot complain of the sheriff's having paid over to the landlord the rent which they were bound to pay. [Lord *Ellenborough*, C.J. The commission operates as an execution; but strictly speaking *execution* is only on a judgment. The case determined in 1 *Atk.* shews it not to be an execution, inasmuch as it will not prevent the landlord from distraining. Here the sheriff has taken in execution the goods of the assignees, instead of the goods of the tenant. How then can they have a right to retain out of that fund which he had no right to take; or how can the landlord claim his rent out of the hands of a wrong-doer?] The sheriff knew nothing of the act of bankruptcy when he levied, and was therefore bound to take the goods and make sale of them according to the exigency of the writ; otherwise he would have been in contempt. It appears that the commission did not issue before the 21st, and the writ was returnable on the 23d. He could not there-

(*a*) 1 *Atk.* 103. (*b*) 2 *Term Rep.* 600.

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fore perform his duty without paying a year's rent over to the landlord. The landlord would have distrained had there not been an execution under which he was entitled to his rent.

Horner and *R. Bayley*, contrà. The sheriff has paid over the money in his own wrong, out of the goods of the assignees, which he had no right to seize. The landlord should have distrained for his rent while the goods were still on the premises; instead of which, being the judgment creditor, he preferred the security of his execution; and that having failed, all the rights derived from it must fail also.

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The Court (*a*) here observed that the learned judge's note omitted to state the date of the payment by the sheriff to the landlord, whether it was before notice of the commission; and inquired of the counsel respecting it. The counsel not being able to supply that fact from their notes of the evidence; the Court then said that it lay upon the defendant to shew that the payment was made before notice of the commission, and ordered that the 140*l.* should be added to the verdict, unless it could be shewn by reference to the learned judge's note that such was the fact.

(*a*) *Le Blanc*, J. was absent as before.

Tuesday, Feb. 11th.

DOE, on the Demise of CHURCH and Another, *against* BARCLAY (*a*).

Though the Court may stay proceedings in a new ejectment until the costs of a former ejectment between the same parties, and also

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the costs of an action for mesne profits dependent thereon are paid; yet they will not extend the rule to include the damages in the action for the mesne profits, however vexatious the proceedings of the present lessors of the plaintiff may have been.

A RULE having been obtained to stay proceedings in this ejectment, until the lessors of the plaintiff should pay to the defendant the costs of a former ejectment brought by the defendant for the same premises in the Court of Common Pleas, and also the damages and costs of an action for mesne profits, wherein the defendant recovered against the lessors of the plaintiff;

Dampier now shewed cause, and admitted that he could not resist the rule as to the costs of the former ejectment, but stated that the Court had never gone farther, and extended the rule, as it was now asked, not only to those costs, but to the damages also recovered in a collateral action.

Best, in support of the rule, cited *Doe d. Pinchard* v. *Roe* (*b*), where the costs of the action for mesne profits were included in the rule; and produced also a rule obtained in this Court in *Easter* term 1806, to stay proceedings in a former ejectment brought by the lessors for the same premises, until the same costs both in the ejectment and in the action for mesne profits were paid. These

(*a*) Note of *M.* and *S.* (*b*) 4 *East*. 336.

costs he said it appeared by the affidavit had never been paid; notwithstanding which, the lessors of the plaintiff, in defiance of that rule, had brought the present ejectment, which was such a contempt of the Court, as, coupled with their other vexatious proceedings disclosed in the affidavit, might well warrant the Court in now adding the damages as well as costs in the action for mesne profits to the rule prayed.

Lord ELLENBOROUGH, C.J. The grounds on which the rule was made absolute in *Doe d. Pinchard* v. *Roe* do not appear upon the report. The Court however, I think, in no case has gone farther than to act upon the costs of a prior ejectment, and, as appears by the rule now produced, upon the costs in the action for mesne profits. But I do not find that it has gone so far as to include the damages; and we think it would not be prudent to go beyond the former rule, notwithstanding the extent of vexation which the affidavit discloses. If any thing can be made of the [235] disobedience to the former rule, it may be moved by way of attachment. Let the proceedings be stayed peremptorily until the first day of next term, unless the costs be paid within two days, and farther until they are paid.

Per Curiam, (*a*) Ordered accordingly (*b*).

(*a*) *Le Blanc*, J. was absent as before.

(*b*) So in *Cooke* v. *Dobree*, 1 *H. Blac.* 10. the Court of *C. P.* refused to stay proceedings till the *debt* and costs recovered by the plaintiff against the defendant in two former actions, under the same circumstances, were paid.

PRATT *against* GROOME (*a*).

Tuesday, Feb. 11th.

In trespass quare clausum fregit if the defendant plead the general issue, and also a special justification that the locus in quo was part of a certain common field, which was then allotted to him by the leet jury of the manor; and the plaintiff reply and new assign to the special plea, after setting out the abuttals of the closes trespassed upon, that the closes newly assigned are different from the defendant's allotment; if in fact they be the same, the defendant is entitled to a verdict on the issue upon the new assignment.

TRESPASS quare clausum fregit, parcel of *Fen Mead* in the parish of *Totternhoe* in the county of *Bedford*. There were other counts laying the close in the parish of *Eaton Bray*, and in *Totternhoe* and *Eaton Bray*. The defendant pleaded the general issue; and 2dly, after averring the closes in the different counts to be one and the same, that the locus in quo is parcel of a common field called *Fen Mead*, which is divided into allotments holden of the lord of the manor of *Eaton Bray*, and within the jurisdiction of the leet jury of the said manor. The plea then set forth a custom for the leet jury to meet at certain specified times, and to set out

(*a*) Note of *M.* and *S.*

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the bounds of the different allotments in the common fields within the manor: that the defendant was seised in fee of a certain allotment within *Fen Mead* holden of the lord, and within the * jurisdiction of the leet jury, and adjoining to an allotment also within *Fen Mead*, &c. possessed by the plaintiff: that the jury set out and determined that the locus in quo was parcel of the said allotment of the defendant, and was his close, soil and freehold, &c. The plaintiff in his replication, after setting out the abuttals to the closes in each of the counts of the declaration, concluded thus: *Which said closes above newly assigned were and are other and different closes than the said allotment or piece or parcel of land of the defendant in his said last plea mentioned.* To this the defendant pleaded not guilty. At the trial before *Mansfield*, C. J. at the last assizes for the county of *Bedford*, the plaintiff's counsel, in opening his case, did not pretend to be able to prove a trespass any where but on the spot allotted to the defendant by the leet jury: whereupon the learned Judge directed the jury to find for the plaintiff on the general issue only, and for the defendant on the not guilty to the new assignment; which they accordingly did.

Sellon, Serjt. in *Michaelmas* term obtained a rule nisi for a new trial, or to enter a verdict generally for the plaintiff, notwithstanding the verdict for the defendant on the other issue.

Blosset, Serjt. now shewed cause, and contended that the plaintiff under this form of pleading had no right to shew a trespass in the place which the defendant by his plea claimed as his allotment; for by his new assignment the plaintiff had waved the trespass to which the defendant had before pleaded in bar. In support of this he cited *Bull. N. P.* 92. *Freeston* v. *Crouch* (*a*). *Freeston* v. *Standford* (*b*). 1 (*Williams's*) *Saund.* 299. *n.* 6. and 2 *Saund.* 5.

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Lord ELLENBOROUGH, C.J. said, there could be no doubt that the not guilty to the new assignment put the whole of it in issue, a part of which was that the close was different from that mentioned in the plea. The Court therefore thought the direction of the learned Chief Justice at the trial right, but they gave the plaintiff leave to amend on payment of costs.

GROSE, J. had left the Court, and LE BLANC, J. was absent at *Horsemonger-lane*.

(*a*) *Cro. Eliz.* 492. (*b*) *Ib.* 355.

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COOK *against* JONES, REEVE, and BENWELL (*a*).

Tuesday, Feb. 11th.

THE defendant *Benwell*, having consented to become surety for the other defendants for the payment of an annuity of 70*l.*, executed certain securities for that purpose, at a meeting held between all the defendants, and one *Whitehead*, an agent for the plaintiff, the purchaser, who observed to *Benwell* that he would not be called on to pay, except in case of default by the other defendants. Previous to the execution, *Whitehead* paid down 490*l.* (the consideration money) in bank notes, which were counted over by the three defendants, each of whom declared the same to be correct, and thereupon executed the deeds, and signed the receipt for the money on the back. *Jones* paid one half of the money to *Reeve*, and retained the other half, and *Benwell* never received any part of it; but no conversation as to his distribution passed in the hearing of *Whitehead*. But *Howard*, the person who negotiated the annuity for the plaintiff, knew that *Benwell* was to be the guarantee.

The defendants obtained a rule nisi for setting aside the judgment signed, and the execution issued against *Benwell*, and for cancelling the warrant of attorney on the following objections; 1st, That the deed and memorial stated the consideration-money to have been paid to *Jones*, *Reeve*, and *Benwell*; although no part of it was in fact paid to *Benwell*, who was merely a surety, and known to be such to the plaintiff or his agent. 2ndly, That the deed and memorial stated the consideration-money to have been paid by the plaintiff, by the hands of *Whitehead*, his agent; whereas 70*l.*, part of the money, was one *King*'s, and was paid by *Whitehead* as *King*'s agent to that amount. 3dly, That the deed and memorial comprised in substance two specific annuities, one of 60*l.*, to *Cook*, and another of 10*l.* to *King*; whereas it was only stamped and memorialized as a single annuity.

Park now shewed cause against the rule, and adverted to the memorial as disclosed by the affidavits, which, in respect of the 1st and 2d objection, he admitted did state that the consideration-money was paid by the plaintiff to the three defendants by the hands of *Whitehead* his agent; and as to the 3d objection, he admitted it also stated that the plaintiff in the indenture declared the money to have been paid by *Whitehead* on behalf of himself (the plaintiff) and *George King*; i, e. 420*l.* on behalf of himself, and

Where an annuity was granted by *three*, one of whom was known to be only a surety for the other two, to whose use the consideration-money was in fact applied; yet all [238] three being present when the money was paid down upon the table, and counted over by them all, and the receipt of it signed by all, it was properly stated in the memorial as a payment made to the three.

And though the deed and memorial stated the consideration-money to have been paid by the grantee by the hands of *W.* his agent, yet as it also appeared by the same instruments that a part of it was the money of a third person; that was held to be no objection: for either *W.* was the agent in fact of the sole grantee, or impliedly the agent, through the medium of [239] the grantee, for such third person also, whose interest was stated in the deed and memorial according to the truth. And one stamp as for one annuity is sufficient.

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70*l.* on behalf of *King;* and that the plaintiff, his executors, &c. would stand possessed of the said annuity on behalf of himself and *King* in proportion to such respective payments. He contended however that the memorial contained the substance and true import of the transaction. For, 1st, the mode of distribution adopted by the defendants after the money was paid did not the less make it a payment to them all; it having been accepted, as between them and the grantee, as a payment made to all, received into their respective hands, and so acknowledged to be by their signatures. 2dly, That *Whitehead* paid the money as the agent of the plaintiff and of him only; notwithstanding the plaintiff might be accountable as a trustee for a portion of the annuity to *King*. And 3dly, that his appearing to be so accountable did not prevent the deed from operating as the grant of a single annuity to him only.

Topping, *Marryat*, and *W. E. Taunton*, in support of the rule, cited the case of *Askew* v. *Mackreth* (*a*), where, upon a similar objection to the first, it was held in *Dom. Proc.* that as Sir *R. Mackreth* had received no part of the consideration-money, although he was present when the money was paid to *Martindale*, and assented thereto, and assigned a receipt for it; the memorial, which stated the consideration of the annuity to have been money paid to him and *Martindale*, was bad. [Lord *Ellenborough*, C. J. said that he believed the opinion of the learned judges had not been expressed upon the point: at least he was sure that he had not concurred in any such construction of the word "to." In this case he observed that the money was paid down in *Benwell*'s presence, and counted by him; and asked what more *Benwell* could have done to make it a payment to him: would it have been more so if he had put it into his pocket?] It was known at the time that *Benwell* was a mere surety, and that the consideration-money therefore was not paid for his benefit, but for the benefit of those for whom he was surety: and the very object of the annuity act (*b*), which directs the consideration of every annuity to be set forth in the memorial, will be frustrated if this be held sufficient. In *Straton* v. *Rastall* (*c*) it was determined that the surety was not chargeable for the receipt of the consideration-money of an annuity, though he had given a receipt for it. This memorial should have stated the consideration to have been paid to *Jones* and *Reeve* only, and not to *Benwell;* which would have been a true setting forth of the transaction. Upon the 2d objection; a person who pays money for others is to be considered

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(*a*) 1 *New Rep.* 214.

(*b*) 17 *Geo.* 3. c. 26. (*c*) 2 *Term Rep.* 366.

the agent of each of those to whose benefit such payment will enure: *Whitehead* therefore should have been described in the memorial according to the reality of the transaction, as the agent both of the plaintiff and of *King*, to the latter of whose benefit a portion of the money paid will enure. 3dly, The stamp affixed is applicable to the grant of a single annuity only; whereas the deed must be considered as working a separate interest in the plaintiff and in *King*, for different portions of the annuity: or if not so, at least as amounting to a declaration of trust by the plaintiff in favour of *King* to the extent of his purchase; in either of which cases the [241] stamp affixed would be insufficient: for if it operated in law as two annuities, two stamps would be requisite by the stat. 48 *Geo.* 3. *c.* 149., if it were to be considered only as a declaration of trust, there should have been an additional stamp of 1*l.* 10*s.* by the same act.

Lord ELLENBOROUGH, C. J. It has been a subject of regret ever since the stat. 17 *Geo.* 3. *c.* 26. passed, that it has not attained the objects thereby proposed, and it has been much lamented that the decisions founded on it have not carried with them that full approbation which it is always desirable should follow the decisions of courts of justice. Most certainly the early decisions upon this statute, requiring that all the res gestæ should be stated in the memorial, have made it extremely difficult to enrol a memorial of an annuity with any safety to the parties interested without reciting verbatum in it all the instruments for securing the annuity. Giving the fullest merit to the intentions of the framers of this act, it has proved an inconvenience to the very objects whom it was intended to relieve, by increasing the hazards of lending money upon this species of security, and consequently enhancing the terms of borrowing upon it: and can this be considered as a boon to the unfortunate persons whose interests were meant to be protected? It may be objected to me that I have concurred in some of those unsatisfactory judgments. I have indeed, in deference to former authorities, felt myself bound to concur in decisions which I regretted at the time; but it was not for me to break up the current of decisions which have passed both in the courts of law and equity; though it is open to every judge to record his regret; and I shall be happy when the time arrives that a new act of parliament, [242] and one more congenial to the interest of all parties, shall be substituted in lieu of the present, with the constructions which have been put upon it. The letter of the act was very early departed from. It has been determined that a memorial of every deed, &c. whereby an annuity shall be granted, means a full and ample state-

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ment of every particular contained in it, more full than what I should have inferred to be necessary from the literal directions contained in the first section of the act, which I should have been content to have followed. But I must now submit to the decisions which have established that it is not sufficient merely to state that which is there in terms required. When the same section requires the consideration or considerations of granting the annuity to be set forth, and the 3d section, which says that the consideration shall be in money only, requires the name or names of the person or persons *by* whom and on whose behalf the consideration shall be advanced; I should have thought it sufficient to state the consideration-money actually paid by the grantee: for it is not required to state the very person to whom the money was paid for the grantor; and we cannot legislate. But it is to-day contended to be further necessary that the different proportions in which that money, so passing from the grantee, has been raised, should appear: yet the act is silent upon the subject. The objections to this annuity are, first, that the deed and memorial state the consideration-money to have been paid to all the defendants, although no part was paid to *Benwell*. But that statement is according to the fact, and also according to the legal effect of the transaction: for all three were present when the money was in fact paid down
[243] upon the table, and *Benwell* I believe actually counted it. The party paying therefore put it potentially into the hands of all the three, and if he had put it into their pockets, I do not know that he could have done more to have fixed it as a payment to all of them. It was afterwards indeed to be divided between two, according to an arrangement amongst themselves: but that will not destroy the effect of it in respect to the grantee, as a payment made to all the three, who as grantors were legally entitled to receive it. 2dly, It is objected that *Whitehead* is only stated to be agent for the plaintiff *Cook*, and not for *Cook* and *King;* and that the act requires that the name or names of the person or persons by whom, *and on whose behalf* the consideration, *or any part thereof*, shall be advanced, shall be set forth. In fact however *Whitehead* was the agent for *Cook*, to whom alone the annuity was to be granted, though *Cook* was afterwards to be accountable for a part of it to *King*. But if *Cook* be considered as an agent for *King* as to part, then *Whitehead*, being the agent of *Cook*, was to a certain extent the agent also for *King;* and that fact, if it were necessary, is industriously stated in the deed and memorial; for it is stated that 70*l*. of the consideration-money was the money of *King*. So that quâcunque viâ datâ, it is properly set forth, and every cavil obviated by a laborious

statement of the real fact. Then as to the 3rd objection, with respect to the stamp, it is answered by the fact; this is not the grant of two annuities, but of one only. It might as well be objected to a bill of exchange given on behalf of two, that there should be two stamps. There is no ground for the objection.

Per Curiam (a), Rule discharged.

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(a) *Le Blanc*, J. absent as before.

DOE, on the Demise of WALKER, *against* GROVES (a).

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Tuesday, Feb. 11th.

THIS was an ejectment for premises in *Garton* in *Holderness*, tried before *Chambre*, J. at the last assizes for the county of *York*. The lessor of the plaintiff brought the action as landlord against the defendant as tenant. It appeared that the defendant entered upon the premises at *Old Lady-day* 1798, and that a regular notice to quit had been given. The contract between the parties was in writing, of which each had a part; and one of the parts was offered in evidence having an agreement stamp only. This was objected to on the ground of its amounting to an actual lease, according to the determination in *Poole* v. *Bentley* (b), and therefore requiring a lease stamp: and a verdict was taken for the plaintiff, subject to the opinion of the Court on the admissibility and effect of the instrument. The contract was as follows: "Agreement made this 7th day of *March* 1798, between *T. Walker* of the one part, and *E. Groves* of the other. The said *T. Walker* doth hereby agree to let, and also upon demand to execute unto the said *E. Groves* a lease of the farm-house, farm-stead, and farm, situate, &c. as the same is now in the occupation of the said *T. Walker*. And the said *E. Groves* doth hereby agree to take, and upon demand to execute, a counterpart of a lease of the said farm; to hold the same from the 5th of *April* 1798, for the term of 15 years, under the yearly rent of 147*l.* to be paid half-yearly, on the 5th of *April* and 10th of *October:* which said lease is to contain the usual covenants, and an agreement for re-entry in case of non-payment of the rent or non-performance of covenants; and also the further covenants, &c. That this agreement shall be binding until the said lease is made and executed. And lastly,

An instrument, dated in *March* 1798, whereby the landlord agreed to let, and also, upon demand, to execute to the tenant a lease of a farm; and the tenant agreed to take, and, upon demand, to execute a counterpart of a lease of the said farm from the 5th of *April* 1798, for 15 years, under a certain yearly rent; which said lease was to contain the usual covenants, and an agreement for re-entry in case of non-payment of rent, and

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also the further covenants, &c.; and this agreement was to bind until the said lease was made and executed, &c.; under which agreement the tenant entered on the 5th of *April* 1798; was held to be a present demise, and therefore requiring a lease stamp; the agreement for a future lease with further covenants being for the better security of the parties.

(a) Note of *M.* and *S.* (b) 12 *East*, 168.

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DOE, Lessee of WALKER, *against* GROVES.

that the said *T. Walker* shall this present season properly cultivate, and at his own expense sow down 10 acres of tillage land with not less than 10 quarters of hay seeds, and 10 stone of small seeds."

A rule nisi for setting aside the verdict having been obtained by *Topping* in the last term;

Park now shewed cause, and contended that this was an agreement for a lease only. He cited the cases of *Goodtitle d. Estwick* v. *Way* (*a*), *Doe d. Coore* v. *Clare* (*b*), *and Roe d. Jackson* v. *Ashburner* (*c*); in the latter of which it was held that the words of present demise may be restrained by others which shew the intention of the parties to be to grant a lease in future. Here that intention is manifested by the provision made for executing a lease of the premises on demand, with covenants to be inserted therein as specified in the agreement: and in *Doe d. Bromfield* v. *Smith* (*d*), the Court was of opinion that a similar stipulation, viz. *for a clause to be added in the lease*, imported that the instrument in which it was contained should operate as a minute of a
[246] lease only, and not as the lease itself. The case of *Poole* v. *Bentley*, relied upon at the trial, was decided principally on the ground of its appearing to be the intention of the parties that the tenant, who was to expend a large some of money on the premises in building, should have the security of a present lease. It is distinguishable therefore from the present case in that respect, and also in this, that there the agreement was to be considered binding *till one fully prepared could be produced;* leaving it doubtful what terms would satisfy such a description of lease: but here the agreement is to be binding only until *the said lease* (*i. e.* an instrument containing the specified covenants) shall be made and executed: and no mischief will ensue in the mean time; as the letting the defendant into possession will constitute him tenant from year to year until the lease is executed.

Topping, contrà, relied upon *Poole* v. *Bentley*, which was a later decision than those cited on the other side, and in which all those cases were brought under review and considered. That case therefore, which was expressly in point, must govern the decision of this.

Lord ELLENBOROUGH, C. J. If by the terms of this agreement it had been provided that there should be no entry until a lease was executed, I should have had considerable doubts. But

(*a*) 1 *Term Rep.* 735.
(*b*) 2 *Term Rep.* 734.
(*c*) 5 *Term Rep.* 163.
(*d*) 6 *East*, 530.

as the case stands it does appear to me that the instrument must be considered as a present lease from the 5th of *April* 1798. From that period it has the operation of a demise, not depending upon the contingency of the party's granting a future lease, which was a stipulation only for the better security of the lessee. It falls therefore within the case of *Poole* v. *Bentley:* and in *Barry* v. *Nugent* (*a*) the Court thought, notwithstanding it was agreed that leases with the usual clauses were to be drawn, that such a stipulation did not affect the words of present demise. Here the lessee might never have the benefit of an executed lease: in the interim, therefore, this was an agreement to operate as a present demise, commencing immediately from the 5th of *April:* though a more formal lease was afterwards to be granted. The cases run upon extremely nice distinctions; but I think this must be taken as a lease within the authorities. [247]

BAYLEY, J. (*b*) I concur with my Lord in thinking that this instrument amounts to a lease. It was the intention of the parties that the tenant should be let into possession of the premises on the 5th of *April,* although no further lease should be prepared at that time, and that he should consequently hold under this agreement of demise. *Barry* v. *Nugent,* it is observable, was decided by this Court on the writ of error: and the case of *Roe* v. *Ashburner* is distinguishable; for there the landlord was to acquire an additional piece of ground, without which the lease was not to be granted. Here the parties have used words of present demise, and it was clearly their intention that the tenant should enter, and, if neither party should require a lease, go on under this contract of demise for the period mentioned therein.

Rule absolute.

(*a*) 5 *Term Rep.* 165.

(*b*) *Grose,* J. had left the court before this case was decided, and *Le Blanc,* J. was absent as before.

1812.

PHILLIPS *against* DICAS, one, &c.

Wednesday, Feb. 12th. The fourth, amongst several other signatures of creditors to the certificate of a bankrupt, having been obtained by the promise of the bankrupt to pay that creditor his whole debt, such certificate is void by virtue of the stat. 5 *Geo.* 2. *c.* 39. *s.* 11. although the creditors who signed before and after the fourth were sufficient in number and value without reckoning that one; for his example might have induced others to sign it.

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The attorney employed by the petitioning creditor before the choice of assignees, and continued by the assignees afterwards, having delivered his bill to the assignees, including all the charges incurred by order of the petitioning creditor in the first instance, and having received a certain sum, on account of his bill generally, from the assignees, is bound, as the assignees themselves were, by the 25th section of the act, to appropriate the sum so received in reduction of the charges incurred by order of the petitioning creditor, and for which he was originally responsible; and therefore the amount of such charges, covered by the sum so received, cannot be set off by the attorney against a debt due from him to the petitioning creditor on his own account.

THE plaintiff declared on a bill of exchange drawn by the defendant for 30*l.*, dated 3d of *June* 1807, and by him indorsed to *S. Worthington*, who indorsed it to the plaintiff, and which was presented and dishonored on the 6th of *August:* to which the defendant pleaded, 1st, the general issue; 2ndly, his bankruptcy and certificate, and that the cause of action accrued before he became a bankrupt; 3dly, a set-off for law charges. At the trial at *Chester*, the plaintiff proved the hand-writing of the defendant to the bill, and a promise to pay it by letter, dated subsequently to the dishonor of the bill, viz. on the 19th of *August* 1807, in which he wrote to the plaintiff, "As to the 30*l.* bill returned, I wish you to prove it under *S. Worthington*'s commission, and I will then pay you the amount, with the expences and interest for it." The defendant then put in his certificate, allowed by the Lord Chancellor on the 4th of *September* 1809, under a commission of bankrupt issued against him on the 22d of *November* 1808. To get rid of the certificate, the plaintiff entered into evidence to shew that it was fraudulently obtained, viz. by a promise of the bankrupt to pay the whole debt of a particular creditor, on condition of his signing it, and an allowance afterwards in account with him of the sum promised: and on the result of this evidence the certificate was held by the Court at the trial to be void. The defendant then had recourse to the plea of set-off; and gave in evidence a bill for law business done by him for the plaintiff, which he had delivered with his plea; which bill having been taxed, amounted to 27*l.* 13*s.* 3*d.* He next produced and proved a bill of costs amounting to 117*l.* 17*s.* 5*d.* for business done for the plaintiff, *as petitioning creditor*, under a commission of bankrupt against *S. Worthington.* The proceedings under the commission were put in by the defendant, who held them as solicitor to the assignees; by which it appeared that the plaintiff was the petitioning creditor. In answer to this, the plaintiff produced and proved the following receipt in the hand-writing of the defendant. "*Manchester*, 17th *May* 1808, received from Messrs. *Cook* and *Cavallan*, the assignees of the estate of *S. Worthington*, 100*l.* upon account of my bill. *J. Dicas.*" The defendant's hand-writing was proved by his clerk; who in answer to a question put by the plaintiff's counsel, whether he had not heard the defendant say that he had received the 100*l.* on account

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PHILLIPS *against* DICAS.

of the petitioning creditor's bill, said, "he had heard the defendant say that he received it on account of his bill on the assignees, but never heard him say that he had received it on account of the petitioning creditor's bill;" and he produced a bill delivered by the defendant to the assignees, amounting to 194*l.* 18*s.* 10*d.*, including all the items charged in the petitioning creditors' bill of 117*l.* 17*s.* 5*d.*, and also charges for business done for the assignees after they were chosen. The defendant's counsel upon this evidence contended that the defendant, not having received the 100*l.* specifically on account of the petitioning creditor's bill, had a right to apply it as a payment of the bill for business done for the assignees; on [250] the general principle, that a person, having two demands, may apply money paid to him generally to which ever account he thinks proper. But to this it was answered, and ruled by the Court below, that the act of the 5 *Geo.* 2. *c.* 30. *s.* 25., did in this case make the appropriation, by directing the assignees to pay out of the first monies received the costs and charges incurred by the petitioning creditor. That the defendant, being solicitor to the assignees, was bound to apply the payment for them in the same manner as the law required them to apply it; and that the defendant never pretended to set up this demand of 117*l.* 17*s.* 5*d.* against the plaintiff, when he promised to pay the bill of exchange, nor before his receipt of the 100*l.* from the assignees, nor till the putting in of his plea of set-off, at which time the bill for the petitioning creditor's charges was first delivered to him. And that nothing appearing in the case to negative the application which the law directed, it must be taken to be a payment to be applied according to law, not depending upon the option of the party, which can only exist in cases where no actual or legal appropriation is made. A verdict was therefore taken for the plaintiff for the balance of 8*l.* 2*s.* 3*d.*, including interest; reserving leave for the defendant to move to enter a nonsuit if this Court should be of a different opinion on the point of law respecting the application of the 100*l.* With respect to the remaining 17*l.* 17*s.* 5*d.*, part of the petitioning creditor's bill beyond the 100*l.*, it was proved that the assignees had received much more than was sufficient to pay it, and that it [251] was included in the bill of 194*l.* 18*s.* 10*d.* delivered to them: and this therefore was agreed to be left out of the case.

Gleed moved in the last term, to enter a nonsuit, or for a new trial; 1st, as to the evidence given to impeach the defendant's certificate; he contended that it was met by the counter evidence that the creditor who had received a collateral consideration for his subscription to the certificate was an immaterial creditor, as with-

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out him there were sufficient creditors in number and value who had signed it; and therefore it was not concluded by the resolution of this Court in *Robson* v. *Calze* (*a*), or of the Court of C. P. in *Holland* v. *Palmer* (*b*); in which latter case the signature of the creditor who was induced to sign was material to the certificate, though that fact is not expressly stated in the case.

The Court asked in what order the signatures were affixed to the certificate in question? and being answered that the objectionable signature stood the fourth, and that the three first signatures were not sufficient in number and value, without reckoning others after the fourth; they said that at all events there was not a sufficiency in number and value, when the fourth signed; and that the creditors who subsequently signed the certificate might have been induced so to do by seeing the signature of the fourth amongst the others who preceded them. That the decision in *Holland* and *Palmer*, whatever the fact might be, had not proceeded upon the ground that the signature of the one creditor, which had been improperly obtained, was required to make up the necessary number and value, but upon the ground that others might have been induced to sign by his example.

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Upon the other point, *Gleed* objected that the stat. 5 *Geo.* 2. *c.* 30. *s.* 25. (*c*), did not intend to shift the liability for the previous costs and charges from the person of the petitioning creditor, to whom the credit was originally given by the attorney employed, to the assignees: but that the plaintiff still remained liable to the defendant in this case for the amount of his bill; though the former was entitled to be reimbursed out of the bankrupt's estate by the assignees.

Lord ELLENBOROUGH, C. J. asked whether there was any evidence that the defendant had taken to the money in the hands of the assignees, and abandoned his claim against the petitioning creditor? To which it was answered that it was so contended on the part of the plaintiff, but denied on the part of the defendant. And on this ground the Court granted a rule nisi to see the Judge's report: which being now made, as before stated;

(*a*) *Dougl.* 227. (*b*) 1 *Bos. & Pull.* 95.

(*c*) By this section the petitioning creditor "shall be and is hereby obliged, "*at his own costs and expences*, to sue forth and prosecute the commission "*until* assignees shall be chosen, &c. and the commissioners shall at the "same meeting which shall be appointed for the choice of the assignees, "ascertain such costs, and by writing, &c. order the assignees, who are "hereby required *to pay and reimburse* such petitioning creditor such costs, "&c. out of the first monies or effects of the said bankrupt that shall be got "in," &c.

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Benyon and *Littledale*, who were to have opposed the rule, were told by the Court that they need not argue the* case. And after hearing *Topping*, contrà, who observed very shortly upon the matter of fact:

Lord ELLENBOROUGH, C. J. proceeded—The law says that the first money received by the assignees out of the bankrupt's effects shall be appropriated by them in exoneration of the costs and charges incurred by the petitioning creditor in prosecuting the commission: therefore when the defendant received the 100*l.* from the assignees, as their agent and attorney, on account of his bill delivered to them, which included all the items of expences incurred by the petitioning creditor, he was bound to appropriate it in the same way in which they were bound to do. And no question was made at the trial as to the remaining sum.

Per Curiam, Rule discharged.

HUGHES and Another *against* POIDEVIN (*a*).

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Wednesday, Feb. 12th.

Where the proceeding upon the recognizance of bail is *by action*, the plaintiff is entitled to the costs of such action, commenced after a return of non est inventus to the capias ad satisfaciendum against the principal, though the bail rendered their principal before the eight days allowed by the practice of the Court after the return of the process against the bail.

THIS was a rule to shew cause why it should not be referred to the Master to tax the plaintiffs their costs in an action upon the recognizance of bail, and why the same, when taxed, should not be paid by the defendant to the plaintiffs. The plaintiffs having obtained final judgment in the original action, and issued a capias ad satisfaciendum thereon, to which non inventus was returned, commenced this action, and served a copy of a bill of *Middlesex* on the defendant, returnable on the 16th of *November*. On the 23d of *November* (within the eight days allowed by the practice of the Court (*b*), the principal was surrendered in discharge of his bail, committed to the custody of the marshal, and due notice of such render and committal served on the plaintiffs' attorney, and afterwards an exoneretur entered against the bail, and the principal remained in custody until discharged by obtaining his certificate.

Gaselee opposed the rule, upon the ground that the party having been rendered within the eight days allowed by the Court, the

(*a*) Note of *M.* and *S.*

(*b*) *Trin.* 1 *Ann. Reg.* If bail are impleaded in debt on the recognizance, they shall have eight days to render the defendant, and on notice thereof, *all further proceedings* shall cease. *Tidd's Pract.* 2d edit. 147, 8. 452.

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HUGHES *against* POIDEVIN.

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plaintiffs were not entitled to their costs in this action against bail; and relied on *Byrne* v. *Aguilar* (*a*), which was a later decision than *Perigal* v. *Mellish* (*b*) and *Abbot* v. *Rawley* (*c*).

Copley, in support of the rule, contended that *Byrne* v. *Aguilar*, where the Court set aside the proceedings against the bail after notice of the render of the principal, did not clash with the two cases cited, which were decisions in point.

The Court (*d*) upon reference to the Master, said it was usual to pay the costs where the proceeding on the recognizance was by action; and thereupon made the rule absolute (*e*).

(*a*) 3 *East*, 306. (*b*) 5 *Term Rep.* 363. (*c*) 3 *Bos. & Pull.* 13.
(*d*) *Le Blanc*, J. was absent as before.
(*e*) See *Mannin* v. *Partridge and Another*, 14 *East*, 599.

END OF HILARY TERM.

CASES

ARGUED AND DETERMINED

IN THE

COURT OF KING'S BENCH,

IN

Easter Term,

In the Fifty-second Year of the Reign of GEORGE III. 1812.

HANLEY qui tam, &c. *against* CUBBERLEY.

Wednesday, April 15th.

THIS was an action to recover the penalty of 10*l.* given by the stat. 25 *G.* 3. *c.* 51. the post-horse duty act, as incorporated with the stat. 44 *G.* 3. *c.* 98., which repeals the old and gives new duties. The second count, on which a verdict was taken for the plaintiff at the trial at *Worcester*, before *Marshall*, Serjt., stated that the defendant, at the time of the offence committed, was a person usually letting horses to hire, and was required to be licensed to let horses to hire by the statute, &c.; and being such person, &c. on the 28th of *March* 1810, did let out *by the stage*, for hire, to another person, a horse to be used, and which horse was used, *in travelling from* Perthshore, *in the county of* Worcester, *to the city of* Worcester, being a distance of nine miles: the defendant not being licensed or authorized so to do by the statute, &c. The fact proved was that a person at *Perthshore* applied, on the 27th of *March* 1810, to the defendant, who kept a public-house there, but was not licensed to let out horses for hire, to let him have a horse *the next day, to go to* Worcester *and back again:* the defendant said that he should have it, and that the distance to *Worcester* was only nine miles. No inquiry was made at the time

A person letting a horse to hire, to go *a certain stage and back again, within the day*, is required to take out a licence by schedule A of stat. 44 *G.* 3. *c.* 98., requiring a licence to be taken out by

every person "who shall let to hire any horse for the purpose of *travelling post* by the mile or *from stage to stage*," &c.; the same act imposing the duty by schedule B on every horse hired *by the mile*

or *stage* to be used in *travelling*, (omitting the word *post*; which seems therefore to have been accidentally retained, without any definite meaning in schedule A.;) such act having been passed to repeal a prior statute, in which the word *post* was introduced on both occasions.

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what the charge would be; but the party rode the horse the next day to *Worcester* and back again, and on his return paid the defendant 5*s.* for the hire of it.

Puller now moved to enter a nonsuit, on the ground that the defendant was not bound to take out a licence for this species of letting a horse to hire *for the day*, to go to a certain place, and back again. This was first determined in *The King* v. *Tooley* (*a*), not to be a *travelling post* within the stat. 25 *G.* 3. *c.* 15. *s.* 4.; and though the word *post* is omitted in the subsequent act of the 44 *G.* *c.* 98., schedule B, which now imposes the duty on horses "let to hire *to travel* by *the mile or stage*;" yet persons are still only required, by schedule A of the latter act, to take out a *licence* for letting any horse "for the purpose of *travelling post* by the mile, or from stage to stage." And though the Court, in the case of *Welsford* v. *Todd* (*b*), which arose upon schedule B, for letting a horse to hire to *travel by the mile or stage*, without accounting for the duty, considered the word *post* as there purposely omitted, and seemed more inclined to adopt the construction which had been put by the Court of Exchequer in *The King* v. *Swift* (*c*) upon the former act, in opposition to *The King* v. *Tooley*; yet they doubted upon this case of a letting to hire *for the day*, to go to a certain place and back again; and gave no judgment upon the first count, which was upon a hiring of that description. It is observable also that the case of *The King* v. *Swift* was upon the clause for not accounting. The legislature, when they thought proper to vary the wording of schedule B, in the latter act, in conformity to the opinion of the Court of Exchequer in that case, have still thought proper in schedule A, upon which this action is framed, to retain the word *post*, after their attention had been particularly called to the difference by the conflicting decisions upon the subject.

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Lord ELLENBOROUGH, C. J. I thought that the case of *The King* v. *Tooley* had been over-ruled, though in gentle terms, by the subsequent cases of *The King* v. *Swift*, and *Welsford* v. *Todd*. The legislature must have meant to make the licence to let, and the duty upon the letting, co-extensive in their application: and if so, it must have been a mere slip to retain the word *post* in schedule A, when it was purposely dropped in schedule B, in the last act.

BAYLEY, J. According to the argument for the defendant, a man might let out a horse upon a contract of this sort liable to the duty, without taking out a licence; which never could have been

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(*a*) 3 *Term Rep.* 69. (*b*) 8 *East*, 580.
(*c*) *M.* 30. *G.* 3. stated in a note to *Welsford* v. *Todd*, 8 *East*, 584.

intended by the legislature. He also thought that it had been decided by the Court of Exchequer in the last year, upon the case of a hiring from *Exeter* to a certain place and back again within the day, that it was liable to the duty.

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HANLEY *against* CUBBERLEY.

Per Curiam, Rule refused.

FLINDT *against* WATERS.

Wednesday, April 15th.

THIS was an action on a policy of insurance on goods on board the ship *Stadt Lubeck,* at and from *London* to any port, &c. in the *Baltic.* In one count of the declaration the interest was averred to be in the plaintiff, and in another it was averred to be in the plaintiff and certain other persons trading under the firm of *Schiller* and Co. The loss was stated to be by capture. The defendant pleaded the general issue; and at the trial before Lord *Ellenborough,* C. J. at Guildhall, the policy produced was dated on the 17th of *September* 1810, and the ship was proved to have sailed shortly before for *St. Petersburgh,* (which at the time of the insurance was not hostile,) but, meeting with bad weather and contrary winds, was not able to reach it before the frost set in, and was obliged in *November* or *December* to put into *Liebau,* another *Russian* port, where she was immediately seized by the officers of the government, and the goods provisionally confiscated: upon receipt of which intelligence the assured gave notice of abandonment to the underwriter. The invoice shewed that one-sixth of the cargo belonged to the plaintiff, (which was paid into court after the action brought,) and the remaining five-sixths to *Schiller* and Co. of *Hamburgh.* The plaintiff further proved the king's licence, dated 25th of *August* 1810, granted under the stat. 48 *G.* 3. *c.* 37. to "*G. Flindt* and Co. of *London,* merchants, on behalf of themselves and others," to load and export on board the ship *Stadt Lubeck,* bearing any flag except the *French,* goods of a certain description from *London* to any port in the *Baltic* not under blockade, &c.: which licence was to remain in force till the first of *January* 1811, if the voyage were not completed before. The defendant relied on an order of council dated the 22d of *June* 1811, recognizing that on the 1st of *January,* in the same year, *Hamburgh* was, by a *French* decree, annexed to and declared to be a part of the *French* empire; and that the action was commenced after such annexation; though it was admitted that the loss happened before. A verdict having been obtained for

The *British* agent effecting a policy of insurance on behalf of alien enemies, who became enemies after the loss happened, but before the action commenced, is entitled to recover against the underwriter, who had only pleaded the general issue: for such temporary suspension during the war of the assured's right of suit upon a contract, legal at the time, and liable to be enforced upon the return of peace, cannot

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be taken advantage of under a plea of a perpetual bar; there being no legal disability in the plaintiff on the record to sue.

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FLINDT against WATERS.

the plaintiff under his Lordship's direction, who thought that as the plaintiff on the record was not an alien enemy, no advantage could be taken of the objection without a plea of alien enemy.

Topping moved in the last term for a new trial, on the ground that the persons interested in five-sixths of the cargo, being alien enemies at the time of the action commenced, no recovery could be had by the plaintiff as agent on their behalf; and cited *Brandon* v. *Nesbitt* (*a*), where this question was so decided upon a plea of alien enemies; and *Bristow* v. *Towers* (*b*), where the evidence of hostile alienage was received upon the general issue, on which a special verdict was afterwards found. He added that the same

[262] point was now pending in two other cases, on which rules had been moved in this court; *Flindt* v. *Andrews*, and *Flindt* v. *Throgmorton*.

The Attorney-General, *Garrow*, *Park* and *Taddy* now contended against the rule, that the defence offered could not be made upon the general issue, in a case like the present, where there was no personal disability to sue in the plaintiff on the record, but that it ought to be pleaded specially, as in *Brandon* v. *Nesbitt*, that the action was brought for the benefit of alien enemies (*c*). In *Bristow* v. *Towers*, which followed, the point of the case was that the subject-matter of the contract, the insurance of enemy's property, was illegal, because no subject of this kingdom could legally make such a contract with one who was an enemy of the king at the time: but that is very different from an objection to the personal ability of a plaintiff to sue, on the ground of his being an alien enemy at the time of the action brought, though the contract itself was legal when it was entered into. Now here the contract was made and the loss incurred before *Hamburgh* became hostile by the conquest of the enemy: the contract remains good, notwithstanding the subsequent hostility of the real plaintiffs' country, and may be enforced by suit in their own names upon the return of peace; but only their personal right to sue is suspended in the meantime. The plaintiff however upon the record is competent to sue: the debt still remains due upon the original contract. The king might if he pleased have seized the debt as due to an alien enemy, and it is his forbearance not to do so: but there is

[263] nothing unlawful or against public policy for one subject, who has a personal capacity and authority to sue upon the contract, to re-

(*a*) 6 *Term Rep.* 23. (*b*) *Ibid.* 35.

(*c*) And vide *Brandon* v. *Curling*, 4 *East*, 410., where, in an action brought on the same policy after the peace, the plaintiff was held not entitled to recover for a loss by capture during hostilities.

cover the debt so due from another subject: the money when recovered still remains in this country, and is no more applicable than before to the resources of the enemy: it is still within the king's reach to seize if he please by process out of the petty-bag office. Then the plaintiff being entitled to sue, the only issue upon the record is as to the fact of the contract, its intrinsic legality, and whether any thing be due upon it; and not as to the alteration of character in the persons for whose benefit the contract was made, which is matter of special plea as a temporary and not as a perpetual bar (*a*). In *Kensington* v. *Inglis* (*b*), this Court, and afterwards the Court of Exchequer Chamber, held that the king having licensed a certain trading with the enemy, that enemy might, in the name of his *British* agent here who affected the policy, recover for a loss upon a policy of insurance on his ship; the contract being impliedly legalized, and there being no personal disability in the plaintiff on the record to sue. In the present case no license was necessary, though one was in fact obtained by the plaintiff on behalf of himself and others, permitting that which was done: and if the subsequent conquest of the enemy could defeat the operation of the licence, it would make it a trap for the licensees. [*Bayley*, J. observed that the party licensed in that case was an alien enemy at the time, and therefore the licence contemplated him in that character: here the parties were alien friends at the time of the licence granted.] That distinction, they contended, was not unfavourable to the present plaintiff, who had once a vested cause of action, and against whom the objection now pressed did not go to the cause of action, but arose upon matter ex post facto, pleadable only in abatement during the war.

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Topping and *Carr*, contrà, insisted that the distinction last adverted to made against the operation of the licence granted in this case, after the character of the licensees became changed from that of alien friends to alien enemies. For in its terms it was granted to *British* merchants on behalf of themselves and *others*, which must mean *other British merchants*, or at most other friends, and not enemies; which latter were never in the contemplation of the crown; and therefore the plaintiff is not entitled to recover as to 5-6ths of the goods insured, which were the property of alien enemies at the time of the action brought. And this objection, which goes to the right of action itself at the time it was com-

(*a*) See upon this subject *Le Brett* v. *Papillon*, 4 *East*, 502, and the authorities there referred to.

(*b*) 8 *East*, 273.

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menced, and does not arise upon subsequent matter, may be taken advantage of upon the general issue; because it was not lawful for the defendant to pay an antecedent debt to an alien enemy, and the law will not imply or give effect to such a promise. The policy of the state intervenes as much to prevent the execution of a contract with an alien enemy after he becomes such, as to prevent the making of a new contract with him. In *Le Brett* v. *Papillon* (*a*), the plaintiff was not an alien enemy at the time of the action brought, but became so afterwards and before
[265] plea pleaded: but though that defence was informally pleaded; yet as the fact appeared to the Court, they held themselves bound ex officio to give judgment against the plaintiff, barring him from further having or maintaining his action. Now where is the difference in reason, whether it appears to the Court by plea upon the record that the plaintiff sues for an alien enemy, as in *Brandon* v. *Nesbitt*, or by an informal plea, as in *Le Brett* v. *Papillon*, that the plaintiff himself is such; or whether it appears by the declaration that the plaintiff on the record sues for the benefit of others, who are proved in evidence to have been alien enemies at the time of the action brought, and who still continue such. [Lord *Ellenborough*, C. J. In *Brandon* v. *Nesbitt*, the party interested had become an alien enemy before the voyage insured was performed and the loss had happened.] But the contract was made when he was a friend. Every reason which applies against a suit by an alien enemy applies equally against an action brought by a trustee for his benefit: and it must be immaterial how the truth of the fact appears to the Court, whether by averment on the record, or by evidence.

Lord ELLENBOROUGH, C. J. The ground of our decision in this case will not at all clash with the doctrine laid down by the Court in *Brandon* v. *Nesbitt*. The point there decided was that the fact of the parties interested in the insurance having become alien enemies before the loss happened might be pleaded to an action brought in the name of the *British* agent who effected the insurance: and the Court are disposed to confirm that doctrine. But the defence of alien enemy must be accommodated to the
[266] nature of the transaction out of which it arises; it may go to the contract itself on which the plaintiff sues, and operate as a perpetual bar; or the objection may, as in a case of this sort, be merely personal, in respect to the capacity of the party to sue upon it. Here the objection is taken upon the general issue,

(*a*) 4 *East*, 502.

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which is a plea of a perpetual bar, and if found against the plaintiff, would have concluded him for ever: so that though peace should be established to-morrow between the two countries, and the crown should not have interfered to seize the debt; yet on this plea in bar the plaintiff would have been for ever estopped to sue for his debt. But here the objection is only of a temporary nature: the contract itself was perfect at the time it was made: the trade was with an alien friend, which required no licence, though one was obtained ex abundanti cautelâ. The insurance, the loss, and cause of action had arisen before the assured had become alien enemies: when therefore they became such, it was only a temporary suspence of their own right of suit in the courts here, as alien enemies; but that objection cannot be carried further, nor applied to the plaintiff as their trustee, who is a subject of the king: otherwise, if it could avail upon this plea, it would be making that a perpetual which in its nature is only a temporary bar. In *Kensington* v. *Inglis* (*a*), a trading adventure with an enemy by the king's licence was held to be a legal interest and insurable, and that the *British* agent of that enemy in whose name the policy was effected might sue upon it. This therefore being only a temporary disability on the part of the assured, and there being no personal disability in the plaintiff, their agent, to [267] sue; he is not excluded from his right to recover by this species of defence set up under this plea of the general issue. I do not say that the crown might not still interfere.

The other Judges concurred; and *Bayley* J. added, that in *Brandon* v. *Nesbitt* the voyage insured was illegal.

Rule discharged.

This decision, it was admitted, governed the other cases of *Flindt* v. *Andrews*, and *Flindt* v. *Throgmorton*.

(*a*) 8 *East*, 273.

LEVIN *against* ALLNUT.

Thursday, April 16th.

THIS was an action on a policy of insurance on goods on board the ship *Theseus*, at and from *London* to any ports or places

A warranty in a policy of insurance, freeing the underwriter from loss by *confiscation of the government* in the ship's port of discharge, does not apply to a case where, upon the arrival of the ship in the roads of *Pillau* within the *Prussian* dominions, she was boarded by two different parties, one of *Prussian* soldiers, and the other the crew of a *French* privateer, who disputed the possession of her, but agreed to take her into *Pillau*, in order to settle their claims; upon which the *Prussian* government referred the matter to the *French* government at *Paris*, where the ship was condemned as prize to the *French* captors, and afterwards given up to them. For the terms of the warranty import something more to be done on behalf of the local government of the port of discharge than the mere act of seizure by or with the permission of such local government.

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in the *Baltic*, backwards and forwards, including the risk of transhipment into boats, &c., and also inland navigation and land carriage, or any other conveyance, until the goods were safely delivered at the houses, &c. of the different consignees, &c., at a premium of 20 guineas per cent., to return 10*l.* per cent. for arrival: *warranted free from confiscation by the government in the ship's port or ports of discharge.* The loss was averred in the several counts to be, 1st, by hostile capture, as prize, while the ship with her cargo was on the high seas, and not in her port of discharge; 2dly, while she was on the high seas, viz. in the Roads of *Pillau*, and not from confiscation by the government in the ship's
[268] port of discharge; 3dly, while she was on the high seas, viz. in the Roads of *Pillau*, by hostile capture by the king's enemies, and not from confiscation by the government in the ship's port of discharge. After a verdict for the plaintiff at the trial before Lord *Ellenborough*, C. J. at *Guildhall*,

Scarlett moved to set it aside and enter a nonsuit, on the ground that the facts proved shewed a loss by *confiscation* of the *government* in one of the ports of discharge of the ship. He stated that in fact the ship and goods insured were destined for *Konigsberg*, of which *Pillau*, which lies 12 miles lower down upon the river *Pregel*, is the port. That the ship arrived and came to anchor in the Roads of *Pillau* belonging to *Prussia*, on the 20th of *Nov.* 1810, and on the next day was boarded by two boats, one containing three *Prussian* soldiers armed and some *Prussian* mariners from *Pillau;* the other containing five *Frenchmen* belonging to a *French* privateer that was then lying in the Roads. That one of the *Prussians* first got on board the *Theseus;* and after all the *Prussians* and *Frenchmen* had boarded her, they disputed about the possession: each party wished to take her to a different place; and the *French* officer who commanded his party declared that he took possession of her on behalf of the *French* Emperor: they all agreed however at last to take her into *Pillau*, in order to ascertain their claims; both *Prussians* and *Frenchmen* continuing in charge of her. But after the cargo had been taken out by order of a *Prussian* custom-house officer, and forwarded to *Konigsberg*, the *Prussian* government referred the matter to the decision of the *French* government at *Paris;* and by the imperial council of prizes there, the ship and cargo
[269] were condemned as prize to the *French* captors, and the property was given up to them. He admitted that this turned out ultimately to be a capture for the benefit of the *French*, but insisted that it was effected with the assistance, consent, and authority of the *Prussian* government, and therefore amounted to a confiscation by

that government. [Lord *Ellenborough*, C. J. There was no *confiscation* in the case, which must be an act done in some way on the part of the government of the country where it takes place, and in some way beneficial to that government; though the proceeds may not, strictly speaking, be brought into its treasury. But here the *Prussian* government only permitted the *French* to run away with the property. If underwriters wish to guard against such a risk generally, they insert a clause to be free from seizure, generally, in the port of discharge, according to the common practice in these cases, and not merely to be free from *confiscation*, which is of more confined meaning. *Bayley*, J. It lies on the defendant to make out that it was a case of confiscation.] The parties could never have intended to use the word *confiscation* in its strict sense, as importing that the proceeds were to be brought into the *Prussian* treasury: it would clearly have been sufficient to have proved that the property was seized by the authority of the government, though they had afterwards burnt it. The emphatical word in the clause is *government;* the underwriters meant to secure themselves against loss by the acts or concurrence of the government. The *Prussian* government was in the act of laying hold of the ship for itself at the time when the *Frenchmen* entered. Every act of open force suffered by the existing government must be taken to be done with their permission and authority. It was not the case of a superior hostile *French* force overpowering the government. If *Prussia* by its treaty with *France* had obliged itself [270] to submit to this, or deemed it prudent to do so for some other real or supposed benefit to itself, it does not make it less the act of the *Prussian* government, though, instead of seizing the proceeds for its own benefit, it afterwards made them over to *France*. The vessel was infra præsidia of *Prussia* when seized.

Lord ELLENBOROUGH, C. J., after recognizing the facts as before stated, said it appeared to him that the conduct of the *Prussian* government shewed the vassalage subjection of it to *France*, but could not be deemed an act of confiscation by that government: it only shewed a permission by the *Prussian* government that *France* should do as it pleased in the *Prussian* ports; and to hold this to be a *Prussian* confiscation would be saying that every country on the continent, too weak at this period to protect its independence against *France*, confiscated all the property which the *French* chose to take within its territories.

GROSE, J. The *Prussian* government did not confiscate, but abjured and renounced the property.

LE BLANC, J. It might as well be said, that if the vessel had

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been captured at sea by the *French*, and afterwards taken into a *Prussian* port, and there appropriated to the use of the captors, that would be a confiscation by the *Prussian* government.

BAYLEY, J. Instead of confiscating, the *Prussian* government say they will have nothing to do with the property.

Rule refused.

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[271] *Thursday, April* 16th.

The mere fact of *keeping* a sporting dog is no evidence of a keeping it for the purpose of destroying the game, without some evidence of its being used for that purpose.

READ *against* PHELPS.

ABBOTT moved to set aside a nonsuit in an action for a penalty of 5*l.* upon the stat. 5 *Ann. c.* 14. for keeping and using a setting dog to kill and destroy game, which was tried before *Wood*, B. at *Gloucester*. The nonsuit proceeded upon the ground that there was no evidence of the dog, which was still young, having been *used* for the purpose of killing game; which he now contended was not necessary, if from other circumstances the jury might infer that the dog was *kept* for that purpose; the words of the statute of *Anne* being in the alternative "keep *or* use;" and the prior statute of the 22 and 23 *Car.* 2. *c.* 25. *s.* 3. having prohibited any other than qualified persons from *keeping* for *themselves* or any *other* person any setting dogs, &c. But being questioned by the Court whether there was any case of a recovery in an action on the game laws upon the bare fact of keeping a dog, without any evidence of its having ever been used by the party for killing game; and admitting that he had not found any such case, the Court refused the rule. And,

Lord ELLENBOROUGH, C. J. said, that according to the argument, the keeping of a dog not for the purpose of destroying the game would be evidence of a keeping in order to destroy it.

Rule refused.

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[272] *Thursday, April* 16th.

A letter addressed by the defendant to Mr. *G.*, who was the plaintiff's attorney, stating that "the bearer, *D. Williams*, has a sum of money to receive from a client of mine some day next week, and I trust you will give indulgence till that day, when I undertake to see you paid," and signed by the defendant, is evidence within the 4th clause of the statute of frauds, 29 *Car.* 2. *c.* 3., to charge him with the debt due from *Williams* to the plaintiff, upon parol proof of its amount, and that Mr. *G.* to whom it was addressed, was the attorney of the plaintiff, and received the letter in that character, from *William s*, the bearer, and not as the principal and creditor.

BATEMAN *against* PHILLIPS.

THE plaintiff counted upon a promise made to him by the defendant to pay the debt of *David Williams*, if he did not pay it, in consideration of the plaintiff's forbearing to sue *Williams* for a week: and having recovered a verdict before *Wood*, B. at *Hereford*,

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Peake now moved to set it aside, and enter a nonsuit, upon the ground that there was no sufficient evidence of the defendant's promise in writing within the 4th section of the statute of frauds(*a*). He stated the facts to be that the plaintiff was about to sue *Williams* for a debt of 80*l.*, and had employed Mr. *Gwyn* his attorney for that purpose, when the defendant addressed the following letter to Mr. *Gwyn*, dated *Monday*. "Sir, the bearer *David Williams* has a sum of money to receive from a client of mine some day next week, and I trust you will give him indulgence till that day, when I undertake to see you paid." (Signed by the defendant.) Mr. *Gwyn* was called as witness at the trial to prove that this letter was addressed to him as the attorney for the plaintiff; that it was brought to him by *Williams*; and the amount of the debt due from *Williams* to the plaintiff was also proved. It was now observed that the name of the plaintiff was not mentioned in the letter, nor the amount of the debt; and that if this could be received in evi- [273] dence to charge the defendant within the statute, it was open to the plaintiff's attorney by parol evidence to have applied the letter to any other person, or for any other sum, in direct contravention of the statute, which meant to exclude all parol evidence of an agreement to pay the debt of another, by requiring the writing to contain the *agreement*, that is, the *whole* agreement. Thus in *Champion* v. *Plummer*(*b*), where the question arose upon a memorandum in writing of the sale of goods, within the 17th section; the writing being signed by the seller only, was held not sufficient to charge him in an action by the purchaser, whose name was not mentioned in it. [*Bayley*, J. The case of *Egerton* v. *Mathews*(*c*) in this Court was the other way. This was an action to charge the buyers upon the agreement to purchase signed by them only. The memorandum did indeed mention the name of the seller, but it did not express in terms the *consideration* for the promise, and therefore did not contain the whole agreement (*d*). Here the con-

(*a*) 29 *Car.* 2. *c.* 3. *s.* 4. by which "no action shall be brought whereby to "charge the defendant upon any special promise to answer for the debt, de- "fault, or miscarriage of another person; unless the agreement upon which "such action shall be brought, or some memorandum or note thereof shall "be in writing and signed by the party to be charged therewith," &c.

(*b*) 1 *New Rep.* 252. (c) 6 *East*, 307.

(*d*) In *Wain* v. *Warlters*, 5 *East*, 10. the word *agreement* in the 4th clause of the statue was considered as including the *consideration* moving to, as well as the *promise* by, the party to be charged; both of which were required to be in writing. Vide 6 *East*, 308. per *Lawrence*, J. But it is sufficient, if the consideration appear by necessary inference and implication, *ibid.*; and vide *Slade* v. *Lill*, 9 *East*, 348.

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sideration is expressed.] That *Gwyn* was the attorney for the plaintiff depends entirely upon his parol evidence: he might have applied the letter to any client of his to whom *Williams* was indebted. [*Bayley*, J. If you had shewn that *Williams* was indebted at the time to another client of *Gwyn*'s, that might have made
[274] a doubt.] *Boydell* v. *Drummond* (*a*) arose upon another branch of the 4th clause of the statute; but it shews the opinion of the Court that the words are to be construed strictly; for they held that *part* performance of the contract within the year was not sufficient to take the case out of the words *to be performed*. So in *Seagood* v. *Meale* (*b*), it was considered that the writing ought to specify all the terms of an agreement for a purchase of houses; amongst others, the sum to be paid.

Lord ELLENBOROUGH, C. J. The parol evidence received did not go to extend the terms of the agreement in writing: it only went to shew that the letter was addressed to him as the attorney for the plaintiff, and not as the principal and creditor of *Williams*. Would it be contended to be necessary to state the very sum to be paid where it appeared that the defendant meant to say to the plaintiff, whatever sum *Williams* owes you I engage to pay it if you will not sue him? If the defendant did not know the exact amount of the debt, might he not contract to pay it in those terms? The parol evidence does not enlarge any term of the letter: and I think it would be holding the statute too strictly to say that this was not sufficient evidence of the contract.

LE BLANC, J. If the doctrine were to be pushed the length now contended for, we must say that a man could not contract in writing with another to pay him for all the goods with which he had furnished a third person in the course of the antecedent
[275] month. Or suppose the writing had only contained a promise to pay *the debt* of *Williams:* would not that be sufficient without mentioning the amount?

Per Curiam, Rule refused.

(*a*) 11 *East*, 142. (*b*) *Prec. in Chan.* 560.

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HOPLEY *against* DUFRESNE.

Friday, April 17th.

THE plaintiff declared, as indorsee, against the defendant, as indorser of a bill of exchange drawn by *H. Pulsford* on *W. Murray*, on the 24th of *September* 1810, at three months after date, and accepted by *Murray*, payable at *Hammersley*'s; and the count contained the usual allegation, that the bill was duly presented for payment, when due, and was not paid. It appeared in evidence before Lord *Ellenborough*, C. J., at the sittings after *Michaelmas* term, that the bill had been accepted by *Murray*, without consideration, for the accommodation of the defendant; that the drawer had no effects in *Murray*'s hands; that when the bill was presented, on its becoming due, at *Hammersley*'s banking-house in *Pall-Mall*, the answer then given was "no effects," of which notice was given the next day: but it appearing that such presentation had been made *after* the banking hours, it was contended that the bill was not *duly presented*, as alleged in the declaration; and upon that objection the plaintiff was nonsuited: though it also appeared that after the declaration in this action was filed, the defendant had applied for the indulgence of a further extension of time to pay the bill; which was insisted upon as a waver of the defective presentation; supposing that the defendant, for whose benefit the acceptance was given by *Murray*, who had since become bankrupt, was entitled to avail himself of such an objection. But it did not expressly appear that when the defendant applied for the indulgence he was apprized of the objection to the presentation.

Garrow, in the last term, applied to set aside the nonsuit, as well upon the ground that as the bill had been accepted by *Murray* for the defendant's accommodation, who had engaged to provide for it when due, he was to be taken as the acceptor, and could not avail himself of the objection: as also, that he had waved it by applying for further time. That it was immaterial that such application was made by him after the action brought; for an admission by him at any time, that he was liable upon the bill, was evidence against him: and that such admission, having been made after the declaration filed, was evidence to shew that his attention must have been called to the fact of a due presentation, which is alleged in it, and concerning which he must be taken to have informed himself truly.

Marryat now opposed the rule, and referred to *Parker* v. *Gor-*

Where a bill was drawn and accepted for the accommodation of the indorser, which was not duly presented for payment when due, by reason that the bill having been accepted payable at a banking-house was not presented till after the banking hours, when the answer given to the holder was "no effects;" yet if such indorser apply to the indorsee, after declaration filed, for further time to make payment of the bill; which declara-

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tion alleged the fact that the bill was duly presented for payment; that is evidence of a waver of the objection, with notice of the fact of which he had the means of informing himself.

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don (*a*) as in point, to shew that were a party takes an acceptance payable at a banker's, the holder must present the bill there for payment within the usual banking hours; otherwise, it is of no effect to charge the drawer on the bill: and here he argued that the defendant, who is sued as indorser, stands in the same situation, and cannot be contemplated in any other character. Secondly, that there could be no waver of the defective presentation, without shewing that the defendant knew in fact of the defect at the time;

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which, though attempted to be, was not shewn in this case. For this he cited *Blesard* v. *Hirst* (*b*), where a subsequent promise by an indorser to pay the bill, having been made under ignorance of the prior laches of the holder, by which he was discharged, was held to be no waver of the objection.

Garrow and *Richardson*, in support of the rule, relied principally on the waver, which took place after the declaration, containing the allegation that the bill was duly presented for payment, was filed, and therefore after the defendant's attention was called to the fact: and they referred to *Lundie* v. *Robertson* (*c*), where a promise by an indorser to pay the bill three months after it became due was held to be primâ facie evidence of his admission that the bill had been presented to the acceptor for payment in due time, and dishonored, and due notice of it given to him.

Lord ELLENBOROUGH, C. J., stopping the argument, said that the Court thought that it should have been left to the jury to say whether, under the circumstances of the case, the defendant had notice, at the time of his application for indulgence, that there had been no due presentation: and therefore made the Rule absolute.

(*a*) 7 *East*, 385. (*b*) 5 *Burr.* 2670. (*c*) 7 *East*, 231.

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Friday, April 17th.

RUCKER and Another *against* ALLNUTT.

Under a policy of insurance of goods at and from *London* to any port or ports, place or places, in the *Baltic*, backwards and forwards; with leave to touch and stay *at* any ports and places, *for all purposes whatsoever*; the assured may wait *at* any port *for information* as to what port in the *Baltic* the ship might safely proceed to discharge her cargo; that being one of the objects of the adventure arising out of the troubled and shifting state of the different governments on the *Baltic* shores from the pressure of the *French* arms: and this liberty, it seems, is not abridged by a subsequent special leave given *to wait for information*, &c. *off* any ports and places.

THIS action was brought upon a policy of insurance upon goods on board the ship *Tugend*, at and from *London* to any port or ports, place or places, in the *Baltic*, backwards and forwards; including the risk of boats, &c. to and from the vessel; with leave to seek, join, and exchange convoys, carry and exchange

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simulated papers and clearances, *touch and stay* AT *any ports and places for all purposes whatever,* take in and discharge goods wheresoever the ship might touch at; and in case the commander of the vessel should find it dangerous to enter either of the above ports and places, or if not allowed to discharge the cargo, *with leave to return* to any ports and places till the cargo was discharged in safety; with liberty to carry a *British* licence, &c. Afterwards there was this clause: and it shall be lawful for the said ship, &c. in that voyage to proceed, sail to, *and touch and stay at any ports and places whatsoever or wheresoever, particularly with leave to wait for information* OFF *any ports or places,* take in and land passengers, without prejudice to this insurance. The loss was averred to be by hostile seizure by persons unknown.

At the trial before Lord *Ellenborough,* C. J. at Guildhall, evidence was given as to the circumstances of the loss by seizure of the government, in the *Swedish* port of *Carlshamm:* and a licence for the purpose of the voyage, under an order of council, was proved to have been granted to Messrs. *Ruckers,* merchants, on behalf of themselves and others, to export the goods, &c. But the only question now made was upon the construction of the policy, in relation to the following evidence. On the 10th of [279] *October* 1810, Mr. *Schneider,* who was an agent of the assured, came to *Carlshamm,* and before the arrival there of the *Tugend,* he took his departure for the *Prussian* side of the continent; having left directions with a house of trade at *Carlshamm,* that he would write them word to what port they should order the ship to proceed on her arrival; but in case they did not hear from him, they were to send her to any port they should deem adviseable, not higher than *Memel.* The ship did not arrive till the 8th of *November,* before which the house at *Carlshamm* had received advice from *Schneider* to send the ship to *Pillau.* They accordingly gave the captain orders on the 10th to sail; but countermanded the orders on the 12th, in consequence of unfavourable intelligence received concerning the political state of *Pillau,* and the other ports on that side of the *Baltic,* which rendered it dangerous for the ship to proceed to them without further advice. But while the ship was thus waiting at *Carlshamm,* as it was supposed in a place of present security, a declaration of war by *Sweden* against *Great Britain* was officially communicated to the merchants on the 1st of *December,* and published generally on the 2d, and an embargo was laid on this and other merchant ships there, by which the *Tugend* was prevented from sailing, as she would otherwise have done for *Memel,* in consequence of orders received for that pur-

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pose on the 2d of *December* from *Schneider*. The goods were afterwards seized, and the captain's papers taken from him on the 7th of *December;* and finally, the goods were ordered to be unshipped, and were confiscated. His Lordship left the question to the jury, whether the captain's stay at *Carlshamm* from the 8th of

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November to the 1st of *December* was longer than was necessary for the general purposes of the ship, exclusive of the mere purpose of waiting *in* that port *for information* as to some place of convenient destination; a stay for which purpose *in* port he thought was not allowed by the construction of the words of the policy, reserving liberty to wait *off* any port for information: though after an attempt to enter *Pillau*, and finding it dangerous, the captain might have been authorized to return to *Carlshamm*, under the express liberty reserved in the policy for that purpose. The jury, on this direction, found a verdict for the defendant; but his Lordship gave leave to the plaintiffs' counsel to move for a new trial, if this construction were wrong.

The Attorney General, in moving for the rule in the last term, admitted that the assured could not justify waiting *in* port, under the special liberty to wait *off* a port for information; but contended that the act was warranted by the general terms and scope of the policy, which contemplating the disturbed state of the continental ports, and the danger of proceeding to any of them without recent previous information, gave leave to the assured to "touch *and stay at* any ports and places *for all purposes whatsoever*," including of course the staying *at* any port *for information:* and that this was not restricted, but rather extended, by the subsequent clause allowing the ship also to wait *off* any port for the special purpose of information: for this was a new liberty given in addition to the former, and consistent with it; and not by way of substitution for or limitation of the former.

Lord ELLENBOROUGH, C. J. said that the only question was

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whether by the subsequent special leave given to wait *off* any port for information, the intention of the contracting parties was not declared to be to exempt the underwriters from all *land* risks of waiting *in* any port merely for information; and thereby to restrain the former general words of leave to stay *at* any port for *all* purposes, to a leave to stay there for all purposes except for information: which question however he thought was very fit to be discussed, and therefore concurred in granting the rule.

It was now argued by *Park*, *Topping*, and *Scarlett*, against the rule, that the very object of giving leave to stay *off* a port *for information* was to ascertain whether that port could safely be entered;

which object of safety would be defeated if, after entering the port, the ship might remain there for any length of time waiting for further information, notwithstanding any incipient and increasing hazard of seizure *in* that port. The general hazard and inconvenience of waiting *off* a port for information would of itself operate as a check against unreasonable delay in such a situation; but there would be no sufficient check against an unreasonable stay *in* a port under the same pretence: it would be more likely to be made a resting-place to wait the event of commercial and political speculations, which were certainly not contemplated to be insured. The mere purpose of waiting for information *off* a port would be speedily and safely obtained if confined to the definite object of ascertaining whether the port could be safely entered; but the waiting *in* a port for information, generally, is indefinite, and gives no assignable limits to the objects or duration of the policy. If the ship might wait in a port for information from the 8th of *November* to the 2d of *December*, why not till the conclusion of the war? The desired information might not be obtained till [282] then. [*Bayley*, J. The question of reasonable time for waiting was for the jury: if the ship had a right to wait for information at all *in* port, the jury would have to consider whether she waited longer than was reasonable for that purpose.] The words "for *all* purposes whatsoever" must be taken with some limitation, otherwise they would cover a stay in port for mere pleasure: but the stay must be understood to be for a purpose connected with the due prosecution of the voyage, and must be limited to a reasonable stay for any purpose. If then the object of the special leave to wait *off* a port for information were to ascertain whether it was dangerous to enter it, it is contradictory to suppose that the assured had leave to enter it under the general words for the same mere purpose of information. The true construction therefore of the whole policy taken together was not to give leave for the ship to wait for information generally during the voyage, but only for a particular species of information, namely, whether she could safely enter a particular port, which would properly be confined, as the special words express, to a waiting *off* the port.

The Attorney-General, *Garrow*, and *Taddy* contrà. One of the principal objects of the voyage was to navigate round the *Baltic*, '*backwards and forwards*,' in search of information where the ship might safely go to trade: the ports of discharge were to be governed by events and upon knowledge so acquired. The clause in question was added for the safety of the underwriters, in order to enable that information to be acquired with the least risk to them. Admit-

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ting that by the general words the * staying *at* any port could only be for a purpose connected with the voyage, yet the staying there for information where the next ship could go with safety was such a purpose: and after having ascertained *off* any particular port, that she might enter it in safety, the risk was lessened to the underwriters by her waiting there till she obtained information where next she should safely go, rather than by waiting upon the high sea, exposed to the additional perils of navigation. There is therefore no inconsistency in the clauses, but each conduces to the objects and safety to the voyage. A *Swedish* port was selected at the time as the safest place to collect information; but it was never intended to make *Carlshamm* a port of discharge. If, without the subsequent words, the assured would have had a right to wait *off* a port for information, there would have been weight in the argument, that the giving special leave to wait *off* the port excluded the waiting *in* it: but the waiting *in* the port was alone covered by the general words; and the additional leave to wait for information *off* any port was superadded for the further safety of the underwriter.

Lord ELLENBOROUGH, C.J. A painful and anxious duty is cast upon the Court to construe an instrument, contradictory and redundant in some of its expressions, and penurious in others of them; the obscurity of which arises partly from the imperfection of the language of those who execute it, and partly from the extraordinary and novel risks meant to be covered by it. We are led by habit to put constructions upon certain words in policies from the common use and understanding of them in other cases; but that will not enable us to construe them with reference to the peculiar nature of the voyage in question. Where the destination of a ship is certain, and the objects of the voyage previously ascertained, I should have no doubt in construing the words of leave "to touch and stay at any ports and places *for all purposes whatsoever*," to mean merely for the purposes of the voyage so ascertained, and not as giving leave to stay at a port for the purpose of speculating as in a coffee-house upon the political state of *Europe;* but only to touch and stay there for the purposes of that voyage, or to avoid some impending peril. On occasions of this kind, my first duty, sitting here, is to divest my mind of any prejudice or previous conception, if any, of the case, derived from my former view of the subject at the trial, and to place my judgment in that state of indifference as to any former opinion expressed by me in which it ought to be for the purpose of justice. Considering then that this adventure had no one definite object at the time, but that the ship had to seek her ports of discharge in the *Baltic* according

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to the information to be collected there; we must look at the general words of leave to touch and stay *at* any port for *all* purposes whatsoever, not as we should read them in an ordinary policy upon a definite voyage, which would not authorize the ship to stay at a port in the voyage merely for the purpose of procuring information as to her ulterior destination, nor in general for any purpose not connected with the port wherein the stay was made; but with reference to the peculiar nature of this adventure. The general words written, giving leave to touch and stay *at* any ports *for all purposes whatsoever*, are certainly words of enlargement beyond the common printed form; and with reference to this adventure, which the assured had to seek information in the *Baltic* as to the ship's port or ports of discharge, would certainly [285] include a liberty to stay *at* any port there *for information* on that subject: and the only doubt has arisen upon the subsequent special words introduced, giving leave to wait for information *off* any ports; which seemed to me at first to imply an exclusion of waiting for that purpose *in* any port. But upon further consideration, it now appears to me that the latter words do not necessarily restrain the former, because they provide for something which was not provided for before. There are other purposes for which the ship might wait *off* a port, besides the obtaining of information, for which special leave is given; such as for taking in and landing passengers; which under the general words would have been a deviation; there was therefore an object in introducing the special words which was not before provided for. In the case then of this new species of adventure, where the obtaining of information as to the ports of discharge of the ship was so material an object of the insurance in the convulsed state of the *Baltic* shores; but without saying that the ship might thus wait at a port for any length of time, or that the assured must not execute the purpose promptly; I am now less inclined than I was before to think that the assured were precluded from going into and waiting at *Carlshamm* for information: at least I should not be satisfied without giving them an opportunity of having the case further considered.

The other Judges concurred in directing a new trial.

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DOE, Lessee of SMELT and Another, *against* FUCHAU.

Saturday, April 18th. Under a proviso in a lease for the entry of the landlord, in case the rent should be in arrear for 14 days, and no sufficient distress found upon the premises, he is entitled to recover in ejectment, on proof of half a year's rent due at Ladyday, and no distress on the premises on *some day* in *May*; the demise being laid on the 2d of *May*, and the declaration served on the 6th of *June*; the defendant giving no evidence to rebut the inference, that there was no sufficient dis-

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tress on the premises within the terms of the proviso; as by shewing that there was a sufficient distress on the premises in *May* up to the day of the demise inclusive; or on the 6th of *June*, when the declaration was served, if that were material with reference to the stat. 4 *G.* 2. *c.* 28. On such proof by the plaintiff the stat. 4 *G.* 2. *c.* 28. dispenses with proof of a demand of the rent on the day it became due.

THIS ejectment was tried before the Lord Chief Baron at the assizes for *Surrey*, and was brought to recover a messuage and half an acre of land in *St. George's Fields*, held under a lease from the lessors to the defendant for a term of 21 years from the 25th of *March*, 1805, at a rent of 42*l.* payable half-yearly; in which lease it was covenanted by the defendant to pay the rent on the several days appointed; with a proviso, "that if the said yearly rent of 42*l.* or any part thereof shall be behind and unpaid *by the space of* 14 *days* next over or after any or either of the said days of payment on which the same respectively ought to be paid as aforesaid, *and no sufficient distress or distresses being found in and upon the same premises* whereby to levy such rent; or if the defendant shall not in all things well and truly perform, and keep all and singular the covenants, &c. herein contained, on his part to be performed and kept," then it shall be lawful for the lessors to re-enter and put out the defendant from the possession. The demise to the plaintiff was laid on the 2d of *May*, 1811; and upon proof that half a year's rent became due on the *Lady-day* preceding, and that the broker who was employed to make the distress for the rent went upon the premises for that purpose *in May*, and found nothing to distrain upon, the plaintiff recovered a verdict.

Lawes now moved to set it aside and enter a nonsuit, on the ground that in order to establish a forfeiture, the lessors ought to have shewn that there was no sufficient distress on the premises for 14 days after the rent was due, as well as that the rent was in arrear; whereas the witness only proved that there was no sufficient distress for one day in *May*, which might have been the case only on that one day. [Lord *Ellenborough*, C. J. If the landlord find no sufficient distress on the premises on any day after the rent is in arrear, and the rent be not paid for 14 days after it is due, surely the right of entry accrues.] At any rate the want of a sufficient distress, ought to have been shewn on some day before the 2d of *May*, when the demise is laid; for that was necessary to give the lessors a title to enter. *Doe d. Forster* v. *Wandlass* (*a*), the ejectment was brought upon a proviso for re-entry in a lease, in case the rent was in arrear for 30 days, &c. It was agreed that there was a sufficient distress on the premises during the *whole* time; and

(*a*) 7 *Term Rep.* 117.

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DOE Lessee of SMELT, *against* FUCHAU.

as the plaintiff only proved a demand of rent *after* the day on which it was due, and a refusal of the defendant to pay it before the re-entry; the Court held that he could not recover at common law for want of a demand of the rent *on* the day it was due; nor under the act of the 4 *G.* 2. *c.* 28. *s.* 2., because there was a sufficient distress on the premises. The statute only dispenses with the proof of a demand of the rent at the day, which was required by the common law in cases of re-entry for non-payment of rent, by shewing that half a year's rent was due *before the declaration served,* "and that no sufficient distress was to be found on the demised premises countervailing the arrears *then* due." Now here there was no evidence at the trial when the declaration was served; otherwise, it would have appeared to have been long after the 2d of *May*, namely, on the 6th of *June* (*a*); and there might then have been a sufficient distress on the premises.

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Per Curiam. The plaintiff gave in evidence that some time in *May*, which was after the rent had fallen in arrear for more than fourteen days, there was no sufficient distress on the premises; that was primâ facie evidence at least to call upon the defendant to shew that there was a sufficient distress on the premises within the terms of the proviso. And the jury might presume from the evidence of there being no sufficient distress some time in *May*, that there was none in *May* before the 2d, when the demise is laid; nor on the 6th of *June*, when the declaration was served, if that were material; unless the defendant shewed that there was. The defendant may still relieve himself, by paying the rent, and all the costs, under the statute.

Rule refused.

(*a*) *Lawes* stated this from an affidavit.

RUCKER and Another *against* GREEN.

Saturday, April 18th.

THE plaintiffs declared in assumpsit upon a policy of insnrance underwritten by the defendant upon goods on board the ship *Fortuna*, at and from *London* to any port or ports in the *Baltic*, backwards and forwards, &c.: and by the policy set out it was declared, in addition to the ordinary terms, to be an insurance on goods "warranted free from capture and seizure in the ship's port

Though a policy of insurance on goods contain a clause of warranty, freeing the underwriter from seizure, in the ship's port of discharge yet the assured having declared generally as for a loss by hostile seizure, without negativing that it was in the ship's port of discharge, is no cause for arresting the judgment after verdict.

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or ports* of discharge." And afterwards the plaintiffs averred the loading of the goods on board the ship, to be carried on the voyage insured; the interest of the several proprietors, as agents for whom they had caused the insurance to be made; and the sailing of the ship with her cargo on the said voyage; and that, "afterwards, and before the said goods were discharged in safety, the said ship with the said goods on board thereof was, with force and arms, and in an hostile manner, seized by certain persons to the said proprietors unknown, and thereby the said goods became and were wholly lost to them;" whereof the defendant had notice; by reason whereof he became and was liable to pay the sum insured by him, &c. After a verdict for the plaintiffs before Lord *Ellenborough*, C. J. in *London*,

Park moved to arrest the judgment, for want of an averment, negativing that the loss by seizure was in the ship's port of discharge (*a*), which was excepted out of the contract of indemnity by the defendant. He relied on the rule laid down by *Buller*, J. in *Spiers* v. *Parker* (*b*), that "after verdict nothing is to be presumed but what is expressly stated in the declaration, and is necessarily implied from those facts which are stated:" and here there can be no implication out of the terms of the contract, which is confined to capture and seizure out of the ship's port of discharge. The defendant does not engage to indemnify the plaintiff against capture and seizure generally; and therefore a general averment of loss by seizure does not bring the case within the contract; nor can it be necessarily implied from such averment

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that the seizure was proved to be out of port. In *Rushton* v. *Aspinall* (*c*), the declaration against an indorser of a bill of exchange, omitting to allege a demand and refusal by the acceptor on the day when the note was payable, was held to be erroneous and not cured by verdict; so if it did not allege notice to the indorser of the acceptor's refusal. The case of *Hitchin* v. *Stevens* (*d*), was there relied on in argument, as establishing the rule, "that where any thing is omitted in the declaration, though it be matter of substance, if it be such that, without proving it at the trial, the plaintiff could not have had a verdict, and there be a verdict for the plaintiff, such omission shall not arrest the judgment." But Lord *Mansfield* explained that rule, and shewed that it only applies to cases where the plaintiff's title being stated, but imperfectly stated, all the *circumstances* which were necessary to be

(*a*) See *Dalgleish* v. *Brooke*, post 296. where such an averment was introduced.

(*b*) 1 *Term Rep.* 141. (*c*) *Doug.* 679. (*d*) 2 *Show.* 233.

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proved in support of it shall be presumed after verdict to have been proved; but that no such presumption can be made where the plaintiff totally omits to state his title or cause of action. If it be said that, without proving a loss by seizure out of the port of discharge, the plaintiff could not have recovered, the same kind of answer might as well have been given in *Rushton* v. *Aspinall.*

Lord ELLENBOROUGH, C. J. By the general terms of the policy, the underwriter is liable for all capture and seizure; but if the capture or seizure be in a particular place, for which the defendant is not liable by the warranty, that is to be shewn by way of defence from him: after verdict therefore we must presume that the seizure was proved to be in a place where the defendant was liable to answer for it. We cannot now intend that the [291] seizure proved was one for which he was not liable.

GROSE, J. agreed.

LE BLANC, J. The introduction of the clause, warranting the underwriters "free from capture or seizure in the ship's port of discharge," in addition to the general terms, is the same as if it were said that they should be liable for all captures and seizures; with a proviso that they should not be liable for all captures and seizures in the ship's port of discharge. It was not necessary for the plaintiff to negative in his declaration that it was a seizure in the port of discharge.

BAYLEY, J. In effect the defendant was to be liable for every seizure, unless it were in the ship's port of discharge: if therefore it were in such a place, that is to be shewn in evidence by way of defence on the part of the defendant.

Rule refused.

LANGDALE and Another *against* TRIMMER.

Saturday, April 12th.

THE plaintiffs declared as indorsees of a promissory note for 30*l.*, payable at *Drummond*'s banking-house, *Charing-Cross*, drawn by *B. Bradly*, on the 22d of *January* 1811, at *Farnham* in *Surrey*, at one month's date, in favour of the defendant or order, who indorsed it to the plaintiffs: and averred that the note was presented for payment at the house where it was made payable on the 25th of *February*, when it became due, and that it was dis-

The indorsee of a bill having [292] lodged it with his bankers in *London*, who presented it for payment at another banking-house, in *London*, where it was made payable, on the 25th of *February*, when it was dishonoured; but under a doubt whether the presentation was not made too early on that day, the bankers again presented it shortly after 5 o'clock on the 26th, when it was again dishonored; on which they immediately returned it to the indorser, in *London*, on that day, and he sent notice of the dishonor by the post of the 27th, into the country where the indorser lived: held that this was due diligence and due notice of the dishonor.

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honored. The only question at the trial, before Lord *Ellenborough*, C. J. in *London*, was whether the plaintiffs had made the note their own by laches in not giving notice of the dishonor in time to the defendant. As to which the evidence was that the plaintiffs, having sent the note to their bankers, it was by them presented for payment at *Drummond*'s on the 25th; by whom it was dishonored for want of effects of the drawer in their hands: but the presentation being, as it was supposed, too soon on that day, it was again presented for payment by the same bankers shortly before 5 o'clock on the 26th; and being again dishonored, it was by the bankers immediately returned to the plaintiffs, who lived in *Holborn*, and who gave notice of the dishonor by letter, put in the post of the 27th, to the defendant at *Farnham*, 38 miles from town, who received it on the 28th. It was objected at the trial before Lord *Ellenborough*, C. J. at *Guildhall*, that the notice was not in time, as the holder is required to give notice of the dishonor of a bill by the next day's post at farthest, and therefore the notice ought in this case to have been sent by the post of the 26th instead of the 27th. But his Lordship considered the notice to have been given in time after the bill was returned to the plaintiffs on the 26th by the bankers, and the jury under that direction found a verdict for the plaintiffs.

Park now moved for a new trial; contending that one day at least had been lost by the plaintiffs' having put the bill into their bankers' hands for the purpose of presenting it for payment before it was returned to them again; and that the holder of a bill could not give himself further time for sending notice of the dishonor, by chusing to adopt so circuitous a mode of presentation, instead of using due diligence himself.

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Lord ELLENBOROUGH, C. J. The banker presented it as a distinct holder at the time, and not as identified with his customers. He returned it to the plaintiffs in due time; and they, as holders of a bill, were not bound to lay aside all other business, and send notice of the dishonor on the same day after 5 o'clock; but might return it by the post of the next day after they had received it.

Per Curiam, Rule refused (*a*).

(*a*) *Scott* v. *Lifford*, 9 *East*, 347. was afterwards referred to.

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Saturday, April 18th.

DOE, Lessee of BANNING, *against* GRIFFIN.

Proof by one of a family, that many years before, a younger brother of the person last seised had gone abroad, and that the repute of the family was that he had [294] died there, and that the witness had never heard in the family of his having been married, is primâ facie evidence that the party was dead without lawful issue, to entitle the next claimant by descent to recover in ejectment.

JEKYLL moved for a new trial in this ejectment, in which the plaintiff had recovered a verdict before *Graham*, B. at *Salisbury;* and stated that the objection arose upon a question of pedigree, whether *Thomas Griffin*, a younger brother of the person last seised, through whom both the lessor of the plaintiff and the defendant were to make title, if at all, had died without issue; which it was incumbent upon the lessor of the plaintiff to shew before he could entitle himself to recover upon the general merits of the case. For this purpose Mrs. *Jeffries*, an elderly lady, one of the family, had been called to prove, that *Thomas* had many years before, when a young man, gone abroad, and according to the repute of the family, had afterwards died in the *West Indies, and that she had never heard in the family of his having been married.* This he contended was not sufficient evidence for the lessor of the plaintiff, on whom the affirmative proof lay, that *Thomas* had in fact died unmarried, and without lawful issue, which was capable of being proved by persons still living, if the fact were so (*a*).

Lord ELLENBOROUGH, C. J. The evidence was sufficient to call upon the defendant to give primâ facie evidence at least that *Thomas* was married; for what other evidence could the lessor be expected to produce that *Thomas* was not married, than that none of the family had ever heard that he was.

Per Curiam, Rule refused (*b*).

(*a*) *Richards* v. *Richards*, *B. R. E.* 4 *G.* 2. *Ford's MS.* "In ejectment the lessor of the plaintiff claimed as heir by descent, and shewed the death of his elder brothers, but not that they died without issue. *Curia.* This must likewise be proved. The plaintiff must remove every possibility of title in another person before he can recover; no presumption being to be admitted against the person in possession." In this case there was no negative evidence of the marriage of such brothers as in the principal case.

(*b*) See *Bull. N.P.* 294. citing *Grimwade* v. *Stevens*, *Kent*, 1697. "Hearsay is good evidence to prove who is my grandfather, when he married, what children he had, &c.: of which it is not reasonable to presume I have better evidence. So to prove my father, mother, cousin, or other relation beyond the sea dead: and the common reputation and belief of it in the family gives credit to such evidence."

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DALGLEISH and Others *against* BROOKE.

Monday, April 20th. Under a policy of insurance on goods from *London* to any ports or places in the *Baltic*, backwards and forwards, &c.; with leave to touch, stay, and trade at all places for all purposes, and to take in and discharge goods wheresoever the ship might touch at; and in case it should be found dan-

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gerous to enter such ports and places, or the captain was not allowed to discharge the cargo, with leave to return, &c. until he found a port which he could enter with safety: the insurance to continue until the ship and goods *arrived* at as above; upon the ship until moored at anchor 24 hours in safety, *and upon the goods until the same should be there discharged and safely landed:* at a premium of 14 guineas, *to return* 7*l.* per cent. *for arrival:* with warranty of the goods *free from capture or seizure in the ship's port or ports of discharge.* Held, 1st, that the ship having arrived in the outer road of *Pillau*, which is a bar harbour, where large ships like this are obliged to discharge part of their cargoes into lighters to enable them to go over the bar into the inner harbour, where they discharge the remainder; and the captain having anchored two miles and a quarter further out than ships usually lie for this purpose; (but which difference was negatived by the verdict of the jury as material to the object of inquiry;) and having gone on shore to report his ship and cargo, and obtain permission to discharge his cargo, and to give directions for it; and having returned in five or six days, when he was accompanied by *Prussian* soldiers and a pilot, who took possession of the ship and cargo, and discharged part of it into a lighter in the place where the ship remained at anchor, and afterwards carried her over the bar into the inner harbour, where the goods were finally confiscated; this was an *arrival* in the captain's elected *port* of discharge, so as to discharge the underwriters from the loss by seizure there, within the meaning of the policy.

2dly, That the assured were entitled to a return of 7*l.* per cent. premium "*for arrival,*" under circumstances which discharged the underwriters from any loss.

THIS was an action on a policy of insurance on goods shipped under a licence from the crown by an order in council, on board the ship *Der Friede*, at and from *London* to any port or ports, place or places in the *Baltic*, backwards and forwards, including the risk of transhipment in boats, &c. and vessels of any denomination to and from the vessel, as also inland navigation; with leave to carry and exchange simulated papers, clearances, and ship's papers; sail under any flag; touch, stay, and trade at all places and islands, particularly *Gottenburgh*, for all purposes whatsoever; take in and discharge goods wheresoever the ship might touch at; and in case the commander of the vessel should find it dangerous to enter either of the above ports or places, or not allowed to discharge the cargo, with leave to return to any ports or places until the commander found a port which he could enter with safety." And the insurance was by the policy declared to continue "until the said ship, with all her ordnance, &c., and goods and merchandises whatsoever, should be *arrived* at as above; upon the said ship until she had moored at anchor twenty-four hours in good safety, *and upon the goods and merchandises until the same should be there discharged and safely landed.*" "And it should be lawful for the said ship, &c. in that voyage, to touch and stay at any ports or places whatsoever or wheresoever; with liberty to seek, join, and exchange convoys, and wait for information off any ports or places, take in and land passengers, with leave to load, unload, and reload the cargo at *Gottenburgh* or elsewhere, as well as to alter the marks and forms of the goods, &c. without being deemed a deviation," &c. *at a premium "of fourteen guineas per cent. to return 7l. per cent. for arrival,"* &c. The goods were also warranted free from capture or seizure *in the ship's port or ports of discharge.* And the plaintiffs averred that *while the said ship with the said goods* on board thereof

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was in the course of the said voyage, and before her arrival at the end thereof, and not *in the port of discharge,* the said goods were with force and arms and in a hostile manner seized, detained, and carried away by certain persons unknown to the plaintiffs, and became wholly lost to the proprietors thereof;" whereof the defendant had notice, and by reason thereof became liable to pay, &c.

It appeared in evidence before Lord *Ellenborough,* C. J. at *Guildhall,* that the ship, with the goods, arrived on the 30th of *November* 1810 in the outer road of *Pillau,* which has an inner harbour within the bar; *Pillau* being also the harbour of *Konigsburgh,* whither the goods were destined. The *Der Friede* [297] was a large ship, drawing ten feet and a half water, and anchored in the outer road in eleven or twelve fathoms water. The captain then went on shore to report his ship and cargo, and obtain permission to discharge his cargo, and to give directions for it; and after a delay of five or six days, till an answer was returned from *Konigsburgh,* he returned on board, accompanied by six *Prussian* soldiers and a pilot, who from that time assumed the management of the ship. The place where the *Der Friede* lay was described to be half a *German* mile, or about two *English* miles and a quarter, northward beyond the usual anchorage and unloading place of ships in the road, and there were then about twenty ships lying at the usual place. This being a bar-harbour, large ships are obliged to unload in part without the bar in order to enable them to get over it. A lighter from the shore came upon a signal alongside of the ship a few hours after the captain returned on board with the soldiers, and lightened her of as much of her cargo as would enable her to go over the bar, which she did the next day. The plaintiff's witness swore that no captain would have voluntarily unloaded his ship so far out as his ship lay at the time, nor was it safe or proper to do so; but that the captain had no authority after his return on board with the soldiers and pilot. The cargo was afterwards condemned, as prohibited goods, for the benefit of the *Prussian* government.

Upon these facts two questions arose, 1st, Whether this was a seizure in the ship's *port of discharge:* and if it were, so as to discharge the underwriter from the loss: 2dly, Whether the assured were entitled to a return of 7*l.* per cent. premium *for arrival,* within the terms of the policy. The case went to the jury with his Lordship's opinion against the plaintiffs, on the first point, and they found a verdict for the defendant; the other was [298] reserved for further consideration. *The Attorney General* in the last term moved for a new trial on the first point; contending that

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this was not a seizure *in* the port, but only *off* the port of discharge. But if the underwriter were discharged from bearing the loss, upon the ground that this was a seizure *in* port; then, on the second point, he contended that the assured were entitled to a verdict for the return of premium, as "for *arrival;*" which meant arrival in the ship's port of discharge. A rule nisi was granted accordingly, which was now opposed by

Park and *Scarlett.* First, whether the ship was or was not within the limits of the port of discharge when she was taken possession of by the soldiers was a question of fact left to the jury, and which they have decided in the affirmative. The road of *Pillau* is within the *port* in its large sense; but in consequence of the bar across the anchorage, there is a nominal distinction between the outward road and the inner harbour. All large vessels lighten their cargoes without the bar; and though this vessel was lying further out than usual when she was seized, yet she had come to an anchor for five or six days, and the captain had gone on shore to report her, and the event proves that she was within the power and control of a land force; and she was in fact unladen, in part, at that place: so that she was treated by all parties concerned as within the *port.* In *Jarman* v. *Coape* (*a*), the word *port,* in a similar warranty to the present, was held not to be confined to any technical meaning, but to comprehend the broad part of the river *Jahde,* within which the ship was lying on and off in the
[299] middle, fifteen miles up, where the river is two miles wide, waiting for instructions where to land, so as best to elude the *French* officers: the object of the warranty being considered to be to exempt the underwriters from land risks. Secondly, as to the return of premium *for arrival;* that must be understood of a *safe* arrival, which this was not; for the ship was seized as soon as it was known what she was, and a force from the land could be sent to take possession of her; so that if it had not been for the warranty which freed the underwriters from loss by seizure in her port of discharge, they would have been liable upon their general contract of indemnity against loss till the goods were safely landed. As against all other perils than that which happened the underwriters were still upon the policy, and therefore are entitled to retain the whole premium. Many cases have occurred of late years, where, upon policies covering the safe landing of goods, though the goods were in fact landed in safe condition, yet having been landed under the control of the local government, for the

(*a*) 13 *East,* 394.

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purpose of seizure and confiscation, the underwriters have been held liable. [*Le Blanc*, J. Has there been any case of this sort where the underwriters have kept the full premium after the arrival of the ship, under circumstances which discharged them from any loss whatever?] The mere fact of the arrival of the ship did not discharge them from their responsibility for the safe landing of the goods; their discharge is by force of the warranty of freedom from seizure in port, which was introduced for their benefit, and not for the benefit of the assured, though they now claim to derive a benefit from it. [*Bayley*, J. Suppose the government had abandoned the seizure after the goods had been landed by them, would not the assured have been entitled to a return of premium as for arrival?] They argued in the negative, because the event of the seizure had happened. [300]

The Attorney-General and *Taddy*, contrà, upon the first point, referred to the case of *Brown* v. *Tierney* (*a*), where the Court of C. P. had decided that the capture by an enemy's ship of a vessel lying in the open road of *Pillau* was not within the warranty of freedom from capture *in port:* and denied that it could make any difference as to the place where the capture was made, whether the capturing force came from the sea, or from the land; for the property was warranted free from *all* seizure in the *place*, whether by an enemy or by the government. [*Bayley*, J. Is it meant to be contended that the whole space called *Pillau* road, which is without the bar, is not within the *port:* if so, what right had the captain to come to an anchor in such a place? It would increase the risk. [Lord *Ellenborough*, C. J. If it were not a proper place of anchorage for vessels at the port, the anchoring there would be a deviation. *Bayley*, J. By anchoring there did not the captain affirm it to be within the port?] The case was not put upon that ground at the trial. It might however happen that a ship might properly come to anchor without the port, as to obtain information whether she could safely enter it; and a liberty of that sort is reserved by this policy. [Lord *Ellenborough*. C. J. There was no pretence for saying upon the facts proved, that this ship came to an anchor where she did for any such purpose; but it was considered and intended at the time as an anchorage in the port of discharge.] There is a known distinction between an open *road* and a *port;* and if the warranty had been intended to include *roads*, they would have been mentioned as well as *ports*. The case might be different where there was no decided port; but where, [301]

(*a*) 1 *Taunt.* 517.

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as at *Pillau*, there is a marked line of distinction between the road and the harbour, it would be a strong construction to say that they meant the same thing, under the general description of *port*. It is evident that by this word the parties meant a known place of security for the ship within the protection of the land. Where else can the line be drawn in a case like the present? In a legal sense indeed the word *port* may be extended greatly beyond such protection, as the port of *London*, which extends below *Gravesend*; or that of *Exeter*, which extends its jurisdiction nearly to *Bridport*: but that is not the sense in which it is used in these policies. The evidence in this case was that no ship for any purpose would voluntarily, or could safely or properly unload her cargo so far out as this ship lay. And though it is said that this question was left to the jury, who have found the fact that this was a seizure *in port*; yet that was founded upon the opinion expressed to them by his Lordship, that a *port* of discharge within the warranty was to be taken in its large and general sense. [Lord *Ellenborough*, C. J. What I said to the jury was that the words "*port* of discharge," as used in this policy, were not to be restrained to the narrow sense contended for by the plaintiffs; but as in *Jarman* v. *Coape*, to be understood of the intended place of discharge, in contradistinction to the high seas: though we are willing to differ as little as possible from the authority of another Court, and to say that the circumstance of a seizure by a force
[302] from the sea, or from the land, will not decide the question of locality, as to where the seizure was made.] The word *port*, in the sense in which it is here used, must either mean within some harbour in which protection can be afforded to the ship from the land, or within those limits which the ship elects for her port of discharge. In *Jarman* v. *Coape* there was no regular port of discharge in view, but the ship was watching an opportunity of running her cargo on shore at any place up the river *Jahde*: that river therefore was her elected port of discharge. But here the ship was bound to a regular port, with known limits, and only dropped anchor where she did far out in the road, preparatory to her entering the port as soon as the captain had returned from the shore, with leave for that purpose; and she was seized before she could qualify herself to enter the port by discharging a part of her cargo into lighters. Upon the second point, they contended that at any rate if the underwriter were relieved by the seizure which took place, as in the port of discharge, from all risks against which the saving clause was to protect him, it was an *arrival* within the clause for a return of premium; and the same as if the ship had

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arrived in safety. They referred to *Simond* v. *Boydell* (*a*), where a clause in policy on goods, to return part of the premium "if sails with convoy *and arrives*," was held to attach on the arrival in fact of the ship, though there was a partial loss of the goods: and *Horncastle* v. *Howard*, (*b*), where the insurance being at 6*l.* per cent, to return 4*l.* if the ship sailed with convoy *and arrived;* this also was held to attach upon the arrival of the ship, though she was captured in the harbour after she had begun to unload.

Lord ELLENBOROUGH, C. J. The narrow construction of the [303] words "port of discharge" in this policy, now contended for, is one of the most extraordinary attempts within my recollection. The policy extends to cover an adventure to all ports and places in the *Baltic;* with liberty to touch, stay and trade at all places, &c. and take in and discharge goods wheresoever the ship might touch at &c. in the most extensive terms; but warranted free from capture or seizure *in* the ship's *port of discharge.* And now after the arrival of the ship in *Pillau* roads, where she came to an anchor for the purpose of discharging her cargo, and where she was seized, we are desired to put the narrowest sense possible upon the words *port of discharge,* and to confine it to the very place where the custom-house is situated, and where the usual conveniences for landing exist only in greater abundance. But with reference to this policy and the adventure thereby meant to be insured, the word *port* is not to be taken in its narrow or strict legal sense; but knowing, as the parties did, that the whole continent was in a state of actual or probable hostility to *British* commerce and that all places were full of danger, when the underwriters, willing to run all the hazards, of the assured in seeking for a port of discharge, stipulate to be free from seizure *in* the *port of discharge* when elected, the meaning of the parties undoubtedly was that the underwriters should not run the risk of seizure in the elected place of discharge, wherever that might be. That if the assured chose to pursue their commerce at the risk of land capture, in addition to the other ordinary risks, they should take that upon themselves. I do not mean by this to say that the question is to turn, as to the place where the capture is made, upon whether it is made by a force from the sea, or from [304] the land, but merely as shewing the intention of the parties in introducing the warranty against seizure in the ship's port of discharge. Lord *Hale* (*c*), in his tract *de Portibus Maris,* says, "a port

(*a*) *Dougl.* 268. (*b*) Before *Mansfield,* C. J. 2 *Marshall,* 671.
(*c*) In the Collection of Tracts published by Mr. *Hargrave,* part 2 *de Portibus Maris, ch.* 2. *p.* 46.

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of the sea includes more that the bare place where the ships unlade, and sometimes extends many miles; as the port of *London* anciently extended to *Greenwich;* and *Gravesend* is also a member of it." He also mentions other instances. He had before said that a port is a haven and somewhat more. It is a place for arriving and unlading of ships. It hath a superinduction of a civil signature upon it, somewhat of franchise and privilege. It hath a ville, &c, that is, the caput portus, &c. So that a port (he says) is quid aggregatum, consisting of somewhat that is natural, viz. an access of the sea whereby ships may conveniently come, safe situation against winds where they may safely lie, and a good shore where they may well unlade: something that is artificial, as keys and wharfs, &c.: and something that is civil, viz. privileges and franchises, &c. Now here the parties meant a *port* in its natural, and not merely in its technical or artificial sense. Nobody will contend that it was necessary for this ship to have arrived at the caput portus or ville before the warranty would attach. The evidence given, that no captain would voluntarily have unloaded where this ship lay, has been relied on; but that was said merely with reference to the danger from the shore. But the meaning of the parties was that if the assured chose to come for the purpose of discharging his cargo within the danger of a land-risk; if he came within a haven, in the large sense of the word, as his elected port of discharge; the underwriter was not to be liable to the risk of
[305] seizure there. It is asked, where else in this case can the line be drawn than at the bar which divides the *harbour* from the *road* so called? I answer, that in a large sense the word *port* will include the haven of the port, into which this ship came to an anchor for the purpose. It is said indeed in the case of *Brown* v. *Tierney*, that the ship, while lying in *Pillau* roads, was as much at open sea as ever she had been: but it has not been attempted to argue this case to that extent; but rather to rely on the greater distance at which this vessel lay from the usual place for unloading ships without the bar. That however was a question which the jury have decided. One part therefore of that case has been repudiated in the argument, and I cannot adopt the other part, as it is applied to restrain the meaning of the word *port* in this policy.

With respect to the other point, the return of premium, I own I have some doubt. If the words, "for *arrival*," be applied to the *ship*, the ship certainly did arrive, and was moored more than 24 hours before the seizure took place; but if the meaning of those words be to be translated by the other words of the policy; that is, that the insurance was to continue "until the ship and goods

should be *arrived* at as above; upon the said ship until she had moored at anchor 24 hours in good safety; *and upon the goods until the same should be there discharged and safely landed;*" it may admit of some doubt whether the whole condition was complied with. That part of the condition which relates to the *discharge* of the goods from the ship was complied with; but the difficulty lies upon the other words *safely landed;* whether the word *arrival* is to be construed with reference to these words: and whether the assured are in a situation under the words of this policy to avail themselves of this as an *arrival* within the clause for return of premium: I am not so clear upon this point as upon the other.

GROSE, J. agreed on the first point, and also reserved his opinion on the other. [306]

LE BLANC, J. Upon the first point, whether this is to be considered as a capture in *port;* if the Court in the case of *Jarman* v. *Coape* are supposed to have gone the length of adopting the mode of capture in the place, either as made by boats from the shore, or by privateers or ships of war from the sea, as the criterion for ascertaining the description of the place where the capture was made, I agree that the decision would be wrong; for whether a capture be or be not made *in port* must depend upon the place, and not upon the mode of the capture. Here it appears that the captain, intending to discharge his cargo at *Pillau,* had cast anchor without the bar, and had left his ship to land in the port and report her; that a ship of her burthen could not go over the bar without unloading a part of her cargo into a lighter; and that this was the common course of all vessels of a certain draft of water: and though this ship lay further out from the bar than ordinary, yet whether she lay so far out as not to be within the *port,* in its large and general sense, was a question for the jury, which they have found for the defendant; thereby affirming that the seizure was made in the ship's port of discharge. The ship must from the circumstance of the bar have begun to unload without it in the ordinary course: and suppose she had been seized after she had thus begun to unload; that would have been a seizure in her elected port within the meaning of the policy. Then it can make no difference that the seizure was made before she had begun to unload, which she must necessarily have done without the bar, but while she was still lying at anchor there, and after the captain had gone [307] ashore in order to report her for the purpose of discharging her cargo there. It seems to me that the ship being in a place which she had elected as the place to begin making her discharge, we must consider her as in her port of discharge within the meaning of the

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policy at the time she was seized. Then as to the other question, whether the assured are entitled to a return of premium; whether *arrival* relates to the arrival of the ship or of the goods, and whether it means *safe* arrival? The term *safe arrival* is with reference to the responsibility of the underwriters. Now the ship and goods had both arrived in safety at a spot which released the underwriters from all responsibility as to their safe arrival in the ship's port of discharge. Then it seems to me that this being for the benefit of the underwriters; if we construe this as an arrival at the port of discharge to release them from any further risk on that account, that entitles the assured to a return of premium.

BAYLEY, J. I consider this to be a seizure *in port* within the meaning of the policy, and therefore that the plaintiffs are not entitled to recover for the loss. In *Jarman* v. *Coape* some expressions may have been used by the Court not so guardedly worded as might have been; but taking the whole together, the sense is obvious, that where a ship in search of a place for landing her cargo is put in such a situation for the purpose as to be exposed to land risk, the underwriter, who is warranted free from capture or seizure in the port of discharge, does not take upon him such a loss, whether it happen by a force from the land or from the sea. Then in considering whether this ship was within her port of discharge at the time of the seizure within the meaning of the contracting parties, [308] let us see whether the assured themselves treated the place where the ship was when she was seized as her port of discharge. *Pillau* is a bar harbour, and such a ship as this must necessarily discharge part of her cargo on the outside of the bar. Then when she arrived at the place without the bar where ships of her burthen unload, I consider her as having reached her port of discharge. But it is said that she lay further out than usual. I ask then what right the captain had to leave his ship there, after bringing her to an anchor, and to go on shore to report her, unless he had elected that as his port of discharge. He had no right to do so, unless as considering the place where he so left her to be part and parcel of the port of discharge. His whole conduct shews that he so treated it. This, therefore, I consider to be seizure in the ship's port of discharge within the fair and only meaning of the policy. As to the other question, it appears to me at present that the assured is entitled to a return of premium. The ship has in fact reached that which was her port of discharge, and the goods have ultimately reached the place of her destination, though not for the benefit of the assured in the event. Both the ship and the goods however arrived safely for the purpose of exonerating the under-

writers from all risks of the voyage, to answer which they had received a large premium, part of which they engaged to return *for arrival.* An arrival has taken place, and they have had the benefit of it; but they say that, because some persons have taken from the assured the goods after arrival, though they the underwriters are not to bear the loss, yet they are to keep the whole premium. This does not seem to me to be the fair meaning of the contract.

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Lord ELLENBOROUGH, C. J. then directed the rule to be drawn up for entering a verdict for the plaintiffs for the amount of the premium, unless the Court, on further consideration, should direct otherwise in the course of the term: but no further direction was given, and the rule stood absolute as before pronounced.

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Tuesday, April 21st.

THIS was an action of assumpsit upon the common money counts, together with a count for interest, to which the defendant pleaded the general issue, and the statute of limitations. At the trial, before *Lawrence*, J., at *Stafford*, a verdict was found for the plaintiff for 130*l.* 15*s.* subject to the opinion of this Court upon the following case.

On the 10th of *May* 1799, *Thomas Bromley*, by his will duly executed and attested, gave and devised to *J. Brittain* and *J. Marshall*, (trustees,) their heirs and assigns, "All that my messuage, dwelling-house, or tenement, with all lands, hereditaments, and appurtenances thereto belonging, situate and being in *Blythbury*, in the parish of *Mavesyn Ridware*, in the county of *Stafford*, *now in the occupation of* Thomas Willett, (*except* one meadow, called *Floodgate Meadow*, containing by estimation two acres or thereabouts, be the same more or less;") in trust, "by and out of the rents and profits of the said messuage, &c. and premises, so devised as aforesaid, to pay unto my niece *Lucy Brown*, during her life, one annuity of 4*l.*

A testator being seised by the same title of a messuage of 19 acres of land, including *Floodgate Meadow*, in the parish of *Mavesyn Ridware*, which parish consists of three townships, *Mavesyn Ridware*, *Blythbury*, and *Hill Ridware*; and having other property in *Hill Ridware*, and nowhere else;

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and the messuage in *Blythbury*, with two of the 19 acres there, being in the occupation of *T. W.*, and the rest of the 19 acres being partly in the occupation of other tenants, and partly in his own; devised "all his messuage, with all lands, hereditaments, and appurtenances thereto "belonging, situate in *Blythbury*, in the parish of *M.R.*, *now in the occupation of* T.W., except *Floodgate* "*Meadow*:" held that the devise was not confined to lands in *Blythbury* then occupied by *T. W.*, but extended to all the lands in *Blythbury*, held under the same title with the messuage; and that the words "*now in the occupation of* T. W." were to be transposed and applied to the messuage then occupied by *T. W.* accordiug to the fact; which transposition would render the whole consistent: whereas without it, the exception of the *Floodgate Meadow* was nugatory, as that never had been in the occupation of *T. W.* And it was no objection to this construction that a residuary clause, giving all *other* the testator's real estate in *Mavesyn Ridware* would have nothing to operate upon; the *Floodgate Meadow* and the property in the township of *Hill Ridware*, being specifically devised in the same clause.

The Court will not suffer questions to be agitated by agreement of the parties in the form of an action for money had and received, in a case where such action does not lie by law.

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&c.; and subject to the said annuity, and all necessary charges and expenses for repairs of buildings, upon further trust, to pay the residue of the rents and profits of the messuage, lands, hereditaments and premises hereinbefore devised as aforesaid, to my nephew *Thomas Hopkins*, during his natural life; and from and after his decease, upon further trust to convey and assure the messuage, &c. and premises so devised as aforesaid unto such person or persons, use or uses, as the said *Thomas Hopkins* shall, by his last will, in writing, duly signed and attested, limit or appoint the same: and in default of such limitation or appointment, to convey the said premises, &c. to the use of the right heirs of the said *Thomas Hopkins* for ever." The testator then gave and devised to the same trustees, their executors, &c. "All that my messuage, dwelling-house or tenement, with the malt-house, lands, and hereditaments thereto belonging, now in the holding or occupation of *J. Burchall*, and all *other* my real estate *in Mavesyn Ridware* in the said county of *Stafford*, and also all that parcel of land situate in *Blythbury* aforesaid, called the *Floodgate Meadow*, now in the occupation of the said *J. Burchall;* to hold the said messuage, &c. lands and premises last mentioned, with their appurtenances, for a term of 500 years, upon the trusts thereinafter declared. And after the determination of the said term, he gave and devised the messuage, &c. malt-house, &c. lands, &c. and premises last mentioned, with the
[311] appurtenances, to his niece *Mary*, the wife of the said *John Marshall*, in fee. He then declared the trusts of the term of 500 years to be, that if *Mary Marshall* should die without leaving issue of her body living at her decease, then that the trustees should within six months after her decease, by sale or mortgage of all or any part of the said messuage, &c. and premises last thereinbefore devised, raise 350*l.* and all charges, &c., and apply the 350*l.* unto and amongst all and every or any of his nephews the said *T. Hopkins* and *J. Hopkins*, and his said niece *Lucy Brown*, or the child or children of their respective bodies lawfully issuing, in such parts, shares, and proportions, as the trustees or the survivor of them, or the executors, &c. of such survivor should think proper: with a proviso, that if *Mary Marshall* should leave one or more child or children of her body lawfully issuing living at her decease, then the said term and trusts thereof to be void. And subject to the payment of his debts and funeral expenses, he bequeathed his personal estate as follows, viz. to *his said nephew* John Hopkins 100*l.*; to *his said niece* Lucy Brown 20*l.*; to *Robert*, *Sarah*, and *Margaret Brown* (children of *Lucy Brown*) 10*l.* a-piece; to Mrs. *Sherratt* 20*l.*; to Mr. *Thomas Chadwick* 10*l.*; to *Ann Lander* 5*l.*; to *his said nephew*,

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Thomas Hopkins 20*l.*; to his relations *James, John,* and *Thomas Moxon* 5*l.* a-piece; to *Ann Moxon* 5*l.*; to *Sarah Marklew* 5*l.*; to *Ann Hart* 5*l.*; to *Mary Chadwick* 5*l.*; and all the rest, residue and remainder of his personal estate, after the payments before mentioned, he bequeathed to his said niece *Mary Marshall* and her husband the said *John Marshall* for their own use. And he appointed the said *J. Brittain* and *J. Marshall* his executors.

The testator died in *November* 1799, leaving *Thomas Hopkins,* the defendant, his nephew and heir at law. *Mavesyn Ridware* is a [312] parish containing three distinct townships, (viz.) *Blythbury, Hill Ridware,* and *Mavesyn Ridware.* At the time when the testator made his will, and also at the time of his death, *his property in* Blythbury *consisted of a messuage and about* 19 *acres of land.* The *messuage* and rather more than *two acres* of land were *in the occupation of* Thomas Willett, who paid a rent of 5*l.* 5*s.* per annum for them. The remainder of the property in *Blythbury* was occupied partly by the testator himself, and partly by one *J. Burchall,* and one *Elinor Hart,* as his tenants; viz., a piece of land called *Nichols Croft,* and the *Floodgate Meadow,* were occupied by the said *J. Burchall,* and *Moor Meadow* by Mrs. *Hart. Thomas Willett never occupied the* Floodgate Meadow. In the township of *Mavesyn Ridware* the testator had no property; and in the township of *Hill Ridware* he had a messuage and buildings, and malthouse, and about 3 or 4 acres of land in the occupation of *J. Burchall,* as mentioned in the will. *J. Brittain,* one of the trustees, died in 1803, leaving the plaintiff surviving trustee; and *Mary Bamford,* the sister and executrix of *J. Brittain,* from the time of his death to the commencing of this action, received the rents of all the property in *Blythbury,* except for the *Floodgate Meadow;* and after deducting out of such rent the annuity of 4*l.* to *Lucy Brown,* (who is lately dead,) and the amount of the repairs upon the premises, paid over the residue to the defendant. The present action is brought to recover from the defendant the amount of all the rents paid to him, *except what accrued from the messuage and land in the occupation of* Thomas Willett *at the time of the testator's death;* the plaintiff contending that he was entitled in right of his wife, *Mary Marshall,* the devisee named in the will, or as surviving trustee named in the will, to the rents and profits of all the [313] land *not in the occupation of* Thomas Willett *at the time of the testator's death.* At the trial the present verdict for 130*l.* 15*s.* was found for the plaintiff, confining his demand to the last six years; subject to the opinion of the Court upon the three following questions.

First, Whether the defendant *Thomas Hopkins* took under the

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will of the testator *all the property in* Blythbury, *except the* Floodgate Meadow ; *or only so much as was in the occupation of* Thomas Willett *at the time when the testator made his will.* Secondly, supposing that *Thomas Hopkins* took only so much of the testator's property at *Blythbury* as was in the occupation of *Thomas Willett* at the time the testator made his will, and at the time of his death : whether he took the remainder, except the *Floodgate Meadow* at *Blythbury*, and the messuage, malthouse and lands at *Hill Ridware*, as his heir at law. Thirdly, whether supposing the defendant not to have taken, either as devisee or as heir at law, more than so much as was in the occupation of *Thomas Willett* at the time of making the will, the surplus paid over to him within the last 6 years as aforesaid can be recovered in this form of action. The present verdict was to stand, or a nonsuit to be entered, according as the Court should direct.

This case came on first to be argued in last *Easter* term, when the Court expressed strong objections to trying a question of this sort in an action for money had and received; which was in effect substituting this action for an ejectment and its auxiliary action for mesne profits : and this too without any privity between these parties, the defendant having only received the money from another, by whom, if at all, it had been tortiously applied. But as to the latter ground of objection, it was observed, that the money had
[314] been received by the defendant under a claim of right, as a cestuy que trust, and therefore not like the case of suing a stranger for money had and received, who had received the money from one by whom it had been wrongfully applied. As the property however was represented to be of very small value, the Court suffered the case to stand over, with a recommendation to the parties to refer it to the decision of an arbitrator.

The case was again set down for argument in the special paper of last *Trinity* term : and when it was called on, Lord *Ellenborough*, C. J. desired it might be understood that the Court would not suffer questions to be agitated, by agreement of the parties, in an action for money had and received, where that action did not lie by law. But after hearing the argument shortly upon the construction of the will, the Court recommended the following inquiries to be made, and directed the case to stand over for this purpose. First, Whether all the testator's property at *Blythbury* was held under one and the same title, or under different titles ? 2dly, Whether the whole had ever been, and if ever, when, in one and the same occupation ; and when it was divided in the manner in which the division subsisted at the time of the testator's will and death ? To which the

following answers were agreed to be returned: 1st, That all the testator's property in *Blythbury* was held under one and the same title, and was conveyed to him by indenture dated the 25th of *December* 1755. 2dly, That about 40 years ago the house and land at *Blythbury* were in the occupation of one *John Moxon*, who continued tenant thereof for several years, and died in possession; and the same were afterwards occupied by his son *Christopher Moxon* for one year; and during their respective tenancies the house and garden were in the occupation of one *Roberts*, who continued in [315] possession thereof some years after the *Moxons* quitted the possession of the land, but during their occupation was subtenant to them. That after *Moxon*, the son, quitted the possession of the land, which happened about the year 1782, the testator took all the land into his own hands, and continued to occupy it till about the year 1791, when he let a field, called the *Moory* or *Blyth Meadow*, to a person of the name of *Handy*, who held the same about two years, when he quitted, and was succeeded by a person of the name of *Hart*, who held it till after the testator's death. About *Michaelmas* 1796 the testator let the field called *Floodgate Meadow* to one *Joseph Marshall*, who held the same for one year, and was succeeded by *Js. Burchall*, to whom the testator let the said field, together with another croft of land called *Nichols Croft*; and *Burchall* continued to hold them till after the testator's death. The remainder of the land the testator occupied to the time of his death, except the house, garden, orchard, and a field of land, which was let to *Thomas Willett* at *Lady-day* 1798, and which he occupied from that time till after the testator's death. During the time the testator so occupied the land, the house and land were in various occupations. After *Roberts* and his family quitted, one *James Lea* entered into possession, and occupied the premises about one year, and was succeeded by a person of the name of *Moore*, who occupied the house, garden, and a croft of land facing the house, about two years, and was succeeded in his tenancy by *Edward Cope* about *Lady-day* 1797, who held the premises one year, and then quitted, and was succeeded by the said *Thomas Willett*.

Richardson, who had before argued the original case for the [316] plaintiff, now argued for him again upon the amended case, and contended that nothing passed by the will to the defendant *Thomas Hopkins*, except the land in *Blythbury*, which was *in the occupation of* Thomas Willett at the time of the devise. He referred to *Doe d. Harris* v. *Greathead* (*a*), which gives the rule from *Plowden* 191. that where a thing is certainly expressed by the first words of de-

(*a*) 8 *East*, 91.

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scription used, there the addition of another certain description is not necessary, and may be rejected as superfluous: otherwise, where the thing first described is uncertain, and another description which makes it certain is added. Here the testator, having at the time three descriptions of land in *Blythbury*; 1. a messuage and about two acres *in the occupation* of *Thomas Willett;* which answers the entire description in the devise in question; 2. another parcel in his own occupation; and 3. the remainder occupied by his tenants *Burchall* and *Hart;* devised "his *messuage,*" (which is certain enough,) "with all *lands, hereditaments, and appurtenances thereto belonging,* (which is quite uncertain) in *Blythbury,* in the parish of *Mavesyn Ridware;* and then he adds that which makes it certain, "*now in the occupation of* Thomas Willett." Then as to the new fact found, that the messuage and the whole 19 acres were held by the testator under an unity of title; yet as there had been a severance of the possession before the making of the will, the question is the same as it was on the original case; and if the words "in the occupation of *Thomas Willett*" be rejected, there are no other words capable of describing with certainty what was meant. As to the
[317] defendant's claim by descent; the whole of what the testator had in the *parish* of *Mavesyn Ridware* passed under the residuary devise of "all other my real estate *in Mavesyn Ridware,*" which must mean the *parish* and not the township of *Mavesyn Ridware,* and consequently did not go to the heir by descent.

Puller was heard for the defendant upon the first argument; but the Court did not think it necessary to hear him now. He then relied upon the exception of the *Floodgate Meadow,* which never had been in the occupation of *Thomas Willett;* from whence it was to be inferred that the testator intended to devise, and supposed that he had given, to the defendant all the estate he had in *Blythbury,* by the general words *all lands,* &c.; otherwise he would not have excepted the *Floodgate Meadow.* The general description of *all lands,* &c. in *Blythbury* would have been quite certain; and it is the additional description "now in the occupation of *Thomas Willett,*" coupled with the exception, which creates the doubt: therefore the rule referred to is rather in favour of the defendant's construction. Upon the meaning of the residuary clause, he shortly mentioned *Ewer* v. *Heydon* (*a*), referring to *Dyer,* 261., that if a man hath land in two hamlets of the same vill, and deviseth all his lands in the vill, and in one of the hamlets, the lands in the other hamlet do not pass; otherwise, if he had devised all his lands in the vill generally.

(*a*) *Cro. Eliz.* 658.

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Lord ELLENBOROUGH, C. J. The fair construction of the will and the justice of the case may be attained by an easy transposition of very few words in the first part of the will, and by construing the words of the residuary devise* to apply to the parish of *Mavesyn Ridware*. The testator had a dwelling-house and 19 acres of land in *Blythbury*, all held under the same title; and that and all the rest of his property was in the parish of *Mavesyn Ridware*. The house in *Blythbury*, with about two of the 19 acres of land, was in the occupation of *Thomas Willett*, but the rest of the 19 acres was occupied, a part by himself, and the rest by other tenants. Then by reading the words "now in the occupation of *Thomas Willett*," as transposed and applied to the dwelling-house, according to the fact, the whole will be consistent, and all the difficulty as to the exception of the *Floodgate Meadow*, and as to the different townships, is obviated.

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GROSE, J. Without this transposition, it seems to be a very perplexed will, and that the testator hardly knew what he was disposing of when he made it: but nothing is so likely to answer his intention as the mode of reading the will proposed by my Lord. The defendant, who was the hair at law and a favorite of the testator, was intended to have all his property in *Blythbury*, except the *Floodgate Meadow*, which was expressly excepted.

LE BLANC, J. The only difficulty arises upon the words "now in the occupation of *Thomas Willett*," in the place where they are found: without those words all the rest would be very clear: it would then have been a devise of "all that my messuage, &c. with all lands, &c. thereto belonging, situate and being in *Blythbury*, in the parish of *Mavesyn Ridware*, in the county of *Stafford*, except one meadow called *Floodgate Meadow*." It appears therefore that the words "now in the occupation of *Thomas Willett*" occurring as they do after the mention of all the lands, &c. in the parish of *Mavesyn Ridware*, are misplaced; for only the messuage and about two acres were in his occupation; so that even if we confined the devise to that which was in the occupation of *Thomas Willett*, there would still be a difficulty; for then the exception of the *Floodgate Meadow* which follows those words would not apply, since *Floodgate Meadow* never was occupied by him. But by the transposition suggested all is made clear. The only observation which can be made against this construction is that having thus disposed of all his estate in *Blythbury* except the *Floodgate Meadow*, and also the property which he had in *Hill Ridware*, he disposes of all *other* his real estate in *Mavesyn Ridware*, in which parish he had no other property undisposed of except the *Floodgate*

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Meadow, which he afterwards specifically devises: but this I think is no objection to the transposition; for nothing is more frequent in wills than such sweeping clauses, after a specific devise of all the estates of the testator, giving all *other* his real estates when he has nothing else left to dispose of. I agree that all not before disposed of would pass by the latter devise.

BAYLEY, J. I think it was the testator's intention by the devise to the defendant of his messuage, with all lands, hereditaments, and appurtenances thereto belonging, situate in *Blythbury*, to give all that he had there under one title, excepting the *Floodgate Meadow*, which he particularly excepted: and then the question is whether the words "now in the occupation of *Thomas Willett*," will restrain the other description. But if they were so construed, [320] the exception would be altogether nugatory; and therefore that exception shews that he meant to pass something more than what was in *Thomas Willett*'s occupation.

Postea to the Defendant.

Tuesday, April 21st.

LOVELL *against* Sir WILLIAM PLOMER, Knt. and S. GOODBEHERE, Sheriffs of the City of LONDON.

The sheriffs of *London* to whom, as such, a writ of special capias was directed, under which they arrested the plaintiff, cannot be sued for damages for not having taken bail for his appearance, according to the stat. 23 *H.* 6. c. 9.; *the sufficiency* of the bail tendered being only alleged to be *within* Middlesex *and* London *taken together*: though it was [321] also averred that from time immemorial the same persons had always been duly appointed to, and had exercised the office of sheriff of the two counties at the same time, and that the defendants were sheriffs of both at the time of the grievance complained of. The st. 23 *H.* 6. c. 9. being a public act, need not be specially pleaded.

THE plaintiff declared in an action on the case against the defendants, *as sheriffs of the city of* London, and stated that on the 13th of *October* 1810 he was duly in custody of one *C. S.*, serjeant at mace to the defendants, so being *such* sheriffs as aforesaid, by virtue of a writ of special capias at the suit of *C. Martindale*, returnable in *B. R.* on the Morrow of All Souls; which writ was indorsed for bail for 700*l.*: and that the plaintiff, so being in the custody of the said *C. S.*, as such serjeant at mace, &c. on the same day, &c. tendered to the said *C. S.*, as such serjeant at mace of the defendants, so being such sheriffs as aforesaid, reasonable sureties of sufficient persons, to wit, of *T. Dodd* and *W. Caslon*, and the same being then and there responsible and sufficient persons, *having sufficient within the county of* Middlesex *and city of* London *taken together*, in which said city of *London* the plaintiff was arrested, and so in custody as aforesaid, to become bail for the appearance of the plaintiff before our said lord the king, &c. at the return of the said writ, &c. And then the plaintiff averred that from time immemorial, and until and at the time of exhibiting this bill, the same persons have been at the

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same time duly appointed to and have exercised the office of the sheriff of the county of *Middlesex* who have been appointed to and exercised the office of sheriffs of the city of *London;* and that before and at the time of the issuing of the said writ of special capias whereon the plaintiff was so in custody as aforesaid, and from thence until and at the time of committing the grievance after-mentioned, the defendants were *sheriffs of the county of* Middlesex *as well as sheriffs of the said city of* London: nevertheless the defendants, not regarding their duty as such sheriffs of *London*, &c. wrongfully and injuriously refused to accept the said sureties so offered by the plaintiff as bail for his appearance at the return of the said writ, and wrongfully and injuriously kept and detained him against his will for a week after he had so tendered to the said *C. S.*, so being serjeant at mace of the defendants as such sheriffs of *London* aforesaid, the said sureties, &c. contrary to the form of the statute, &c. and to the plaintiff's damage, &c. There was a second count omitting the averment that from time immemorial the same persons had been appointed to exercise at the same time the offices of sheriffs of *Middlesex* and sheriffs of *London*.

To this the defendants demurred, and shewed these special causes: 1st, that before the act of the 23 *H.* 6. *c.* 9., no sheriff was by law bound to bail a person arrested upon mesne process, unless the person so arrested sued out a writ of mainprize: and it is not alleged in the declaration that, though the plaintiff was arrested upon mesne process, he had sued out any writ of mainprize: or that the defendants, as such, sheriffs, had refused to bail him after any [322] such writ of mainprize sued out. 2dly, That it is not averred that the defendants were bound by law to accept as bail for the plaintiff the persons offered as bail; and that if the defendants, as such sheriffs, were bound to accept bail for the plaintiff's appearance, according to the exigency and tenor of the writs mentioned, they were only so bound by the stat. 23 *H.* 6. *c.* 9. which is a private statute, and ought to have been specially stated in the declaration. 3dly, That as by the statute it is enacted that sheriffs, &c. shall let out of prison all persons arrested and in their custody by force of any writ, bill, or warrant in any action personal, &c. *upon reasonable sureties of sufficient persons having sufficient within the counties* where such persons be so let to bail or mainprize, to keep their days in such place as the said writs, &c. shall require; yet it is not averred that *T. Dodd* and *W. Caslon*, who were tendered as sureties and bail for the plaintiff, *were sufficient persons*, or that either of them was a sufficient person, *having sufficient within the city of* London, *in the bailiwick of the said sheriffs*, where the plaintiff was so arrested

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and required to be bailed, &c. 4thly, That it is not averred that the jurisdiction, authority, or duty of the defendants, as sheriffs of the city of *London*, are connected with or dependent upon their jurisdiction, duty, or authority as sheriff of *Middlesex*, or that they are by any law or usage bound to mix with or call in aid the knowledge or information acquired by them as sheriff of *Middlesex* for the purpose of the execution of a writ directed to them as sheriffs of *London:* yet the plaintiff has declared against the defendants as sheriffs of *London*, and has attempted to charge them, as such, for
[323] an alleged breach of duty as sheriff of *Middlesex*. 5thly, That the writs in the declaration mentioned are therein stated to be directed to the defendants, *as sheriffs of the city of* London, and therefore by law could only be executed by them *as such sheriffs of* London; and they could not by law officially or in any manner mix therewith or call in aid, nor were they by law bound to mix therewith or call in aid their duty, knowledge, or means of information, *as sheriff of* Middlesex, for any purposes of or connected with the execution of the said writs, or taking bail thereto. 6thly, That although by law the same person may execute two different offices, he cannot be made answerable or liable in one capacity for acts done or omitted to be done in another: and yet the plaintiff has attempted to charge and make the defendants, as sheriffs of *London*, answerable for acts, part of which they could only be answerable for as sheriff of *Middlesex*.

Bolland, for the defendants, waved the two first special causes of demurrer stated; admitting that since the case of *Samuel* v. *Evans* (*a*), the stat. 23 *H.* 6. *c.* 9. must be deemed to be a public act, of which the Court would take notice, without its being specially pleaded: and relied upon the third and subsequent causes of demurrer, for the reasons therein set forth; but said that he could not find any case in point.

Reader, for the plaintiff, mentioned *Creswell* v. *Hoghton* (*b*), where in an action against the sheriff of *Lancashire* for not taking bail offered by the plaintiff, who was arrested on mesne process, the
[324] allegation was general, that the plaintiff "offered to the said bailiff reasonable sureties of sufficient persons to become bail," &c.; without alleging their sufficiency to arise within the county: though he admitted that this objection was not taken. But finding that all the Court were decidedly with the defendants upon the objection, he urged nothing further against it.

Lord ELLENBOROUGH, C. J. If the question were arguable, we would call upon you to argue it; but the words of the statute (*c*)

(*a*) 2 *Term Rep.* 569. (*b*) 6 *Term Rep.* 355. (*c*) 23 *H.* 6. *c.* 9.

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are too plain to admit of doubt. The sheriff is required to let parties arrested to bail, "upon reasonable sureties of sufficient persons, *having sufficient within the counties where such persons be so let to bail*, &c.

Per Curiam. This action cannot be supported.

Judgment for the Defendants.

TAYLOR and Another *against* WILSON.

Tuesday, April 21st.

Freight may be insured from *St. Ubes* to *Portsmouth*, upon a ship which sailed with a cargo from *St. Ubes* for *Gottenburgh*, with intent to proceed first to [225] *Portsmouth*, to take up convoy in her way to *Gottenburgh*: and this, without notice to the underwriters that the ultimate destination of the ship and cargo was *Gottenburgh*.

THIS was an action against the underwriter on a policy of insurance dated the 11th of *February* 1809, for 100*l.* on freight on the ship *John*, upon a voyage at and from *St. Ubes* to *Portsmouth*, with liberty in that voyage to seek, join, and exchange convoy; at a premium of 8 guineas per cent., to return 4*l.* per cent. if the ship should depart with convoy bound for *England*, and arrive. The policy contained the following common clause in print, with the addition of the words in italics, which were in writing. "Beginning the adventure upon the said goods and "merchandises from the landing thereof aboard the said ship upon "*the freight of* the said ship, &c. at *St. Ubes*, and so shall continue "and endure during the abode there upon the said ship, &c., and "further until the said ship, with all her ordnance, tackle, apparel, "&c. and goods and merchandises whatsoever, shall be arrived at "*Portsmouth*." In the margin at the foot of the policy were written the words, "*on freight*." The declaration stated that divers goods and merchandizes were loaded and put on board the said ship at *St. Ubes*, to be carried therein on freight from thence on the voyage in the said policy of assurance mentioned, and that the plaintiffs were interested in the said freight. It then stated that the vessel, with the goods on board, sailed from *St. Ubes* on her said intended voyage, and that before her arrival at *Portsmouth* she was lost by the perils of the seas; by reason whereof the goods were not carried to nor ever arrived at *Portsmouth*, and that the said freight was thereby wholly lost to the plaintiffs. At the trial in *Northumberland* before *Chambre*, J. the plaintiffs were nonsuited, subject to the opinion of the Court on the following case.

The defendant subscribed the policy and received the premium of 8 guineas. The plaintiffs were owners of the ship *John;* and on the 5th of *Sept.* 1808 the plaintiff *Taylor*, who was the master of the vessel, and who is so stated to be in the policy,) on behalf of himself and the other owner *Chaters* chartered the vessel; and by the charter-party she was to proceed from *Newcastle* to *Lisbon* with

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coals, and from thence to *St. Ubes* in *Portugal*, and there take in a cargo of salt for *Gottenburgh* in *Sweden*. *The plaintiff *Taylor* proceeded as master with the vessel to *Lisbon*, and there delivered the coals, and arrived at *St. Ubes* in *December* 1808, and there loaded 366 tons of salt to be carried to *Gottenburgh*. The freight for each keel of coals to be delivered at *Lisbon* was 50*l.*, and for each ton of salt was 5*l.*; and the plaintiff *Taylor*, as master, signed bills of lading for the salt which was to be carried to *Gottenburgh*. The bill of lading was for *Gottenburgh*. *Portsmouth* is one of the places from whence convoys were appointed to go to *Gottenburgh* and other ports in *Sweden;* and it was the intention of *Taylor*, the master, to proceed from *St. Ubes* with the vessel to *Portsmouth* on her way to *Gottenburgh*. No communication was made to the underwriters, that the vessel was to go to *Gottenburgh*. On the 25th of *January* 1809 the vessel, with the salt on board, sailed from *St. Ubes* for *Gottenburgh*, and on the 4th of *February*, and before her arrival at *Gottenburgh* or *Portsmouth*, she was lost by the perils of the sea. If the plaintiffs were entitled to recover, the verdict was to be entered for 100*l.*: otherwise, the nonsuit was to remain.

Littledale contended for the plaintiffs, that they had an interest in the freight during every part of the voyage, and were consequently interested in the event of the ship's arrival at *Portsmouth*, where she was expecting to join convoy for *Gottenburgh*, by which the perils of the remaining portion of the voyage would be lessened. This is no wagering policy within the prohibition of the stat. 19 *Geo.* 2. *c.* 37., which was made against persons who had no interest at all, and does not prohibit insurance of interest during a part only of the time it is in peril. The plaintiffs' interest therefore is not to be measured by the freight which was to become due at *Portsmouth*, but by the freight on board, which they were in the act of earning when it was defeated by the peril insured against. There is nothing in the subject-matter of freight, more than in the subject-matter of goods, which precludes the insurance of it for a part only of the voyage. The plaintiffs might have thought that the dangers of the latter portion of the voyage from *Portsmouth* were sufficient to induce them to insure against them, or the premium might be greater for that portion than they thought fit to give. [*Bayley* J. Might they not have effected a time policy on the freight?] No doubt they might; and for the same reason could insure it during a part of the voyage. Freight upon a charter-party for one entire voyage, at and from *London* and *Teneriffe* to any of the *West India* islands, may be recovered upon an insurance on such freight, though the loss hap-

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pened before any of the goods were laden on board at *Teneriffe* (*a*). So in the case of a ship chartered on an entire voyage from *London* to *Dominica* and back again, it was held that the policy on freight, on the homeward voyage, attached while the ship lay at *Dominica* delivering her outward cargo, before any part of the homeward cargo was shipped (*b*): and yet the freight in these cases was not even begun to be earned. Here all the averments in the declaration were proved. The only case which bears against the plaintiff's claim is *Murdock* v. *Potts* (*c*) before Lord *Kenyon* at nisi prius; but the question there was never moved in Bank, and that decision has not been followed by any other case, and is therefore open to be discussed as upon a motion for a new trial.

Brougham, contrà, observed that the learned Judge before whom this case was tried had been of the same opinion as Lord *Kenyon* in *Murdock* v. *Potts*, and had nonsuited the plaintiffs. The question here is not whether a party, having an interest in freight from *A.* to *C.*, may insure it part of the way to *B.*, if the real fact be disclosed to the underwriters; but here the assured did not disclose to them that the voyage was from *St. Ubes* to *Gottenburgh*, and that they wished to insure part of it to *Portsmouth*; but they insured as upon a distinct voyage to *Portsmouth*, which was a different risk from that upon which the ship sailed, and the underwriters were led to believe that if she arrived safely at *Portsmouth*, the freight would be wholly earned. Suppose then the ship had been stranded between *St. Ubes* and *Portsmouth*, and after an abandonment had been gotten off and had arrived at *Portsmouth*; yet the underwriters would have derived no benefit from the abandonment, as they might have calculated upon; for there might afterwards have been a total loss between *Portsmouth* and *Gottenburgh*. The objection here is not that all the averments were not proved, but that something more was proved, namely, the further extension of the voyage from *Portsmouth* to *Gottenburgh*, which shewed a different risk from that which was insured. In addition to the authority of *Murdock* v. *Potts*, is *Woolridge* v. *Boydell* (*d*). That indeed was an insurance on *ship* at and from *Maryland* to *Cadiz*; but the principle is the same. The evidence went to prove that the ship was bound to *Falmouth*: upon which the jury, by Lord *Mansfield*'s direction, (which was afterwards confirmed by the Court) found a verdict for the underwriter, though the loss was proved to have

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(*a*) *Thomson* v. *Taylor*, 6 *Term Rep.* 478.
(*b*) *Horncastle* v. *Suart*, 7 *East*, 400.
(*c*) Sittings at *Guildhall* after *Trin.* 1795., cor. Ld. *Kenyon*, 2 *Park*, 399.
(*d*) *Dougl.* 16.

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happened before the dividing point. It might as well have been contended there, that there was no difference in the voyage to *Cadiz* or to *Falmouth*, as far as it had proceeded, and therefore that the risk was the same to the underwriters; but the Court thought otherwise. Lord *Mansfield* said that all contracts of insurance must be founded on truth, and the policies framed accordingly; that the voyage to *Cadiz* was never the voyage intended, and consequently was not what the underwriters meant to insure. [*Bayley* J. There the ship never sailed upon the voyage insured at all; but here the ship did sail for *Gottenburgh* by the way of *Portsmouth*.] The case of *Way* v. *Modigliani* (*a*) lays down the same principle as the other cases.

Littledale, in reply, denied that the non-disclosure to the underwriter of the ultimate destination of the ship beyond *Portsmouth* could make any difference in this question; it being clear that the ship had originally sailed for *Portsmouth* on its way to *Gottenburgh*.

Lord ELLENBOROUGH, C. J. The only question is whether a freight voyage may be insured part of the way. This was a voyage to *Gottenburgh* by the way of *Portsmouth*, and the freight was to be earned at *Gottenburgh*. There might be a greater peril in the first part of the voyage than in the other, which might have induced the plaintiffs to insure the first part. They did not deceive the underwriter when they insured their freight from *St. Ubes* to *Portsmouth*: they did not tell him that the freight was to be earned there, but only that it was an insurance on freight in that
[330] voyage. There is no doubt that a party may insure his ship and goods during part of a voyage; and I cannot conceive why he may not also insure freight in the same manner. There is no case which intimates the contrary, except that of *Murdock* v. *Potts* at nisi prius, which was never brought before the Court, and is inconsistent with all the other cases. Except that opinion there is nothing to distinguish an insurance on freight in this respect from an insurance on ships or goods for a part of the voyage. There is no foundation for saying that a voyage is not divisible as a subject of insurance. I do not find that any of the allegations in the declaration are untruly made. It is stated that the goods were put on board the ship at *St. Ubes*, to be carried on freight from thence on the voyage mentioned in the policy, that is, from *St. Ubes* to *Portsmouth*; that the plaintiffs were interested in the said freight; that the ship sailed with the goods on her said intended voyage, and before her arrival at *Portsmouth* was lost, by which the freight

(*a*) 2 *Term Rep.* 30.

was lost to the plaintiffs. All this is true: the ship did sail from *St. Ubes* for *Portsmouth;* and the freight has been lost to the plaintiffs by a peril insured against before the ship's arrival at *Portsmouth.* It is said that the freight would not have been earned before the ship arrived at *Gottenburgh;* but where freight is in the course of being earned, as this was, the underwriter upon freight is liable for any loss from a peril within the scope of the policy, which prevents its being earned. The cases which have turned upon the point, that there was no inception of the voyage insured, do not apply. If a traveller be only going to *Hounslow,* he cannot be said to be upon his journey to *Bagshot,* though it be the same road as far as *Hounslow.* The only argument which can be brought to bear on the case on the part of the defendant is that [331] derived from the abandonment: but that in no way affects the risk of the underwriter. It rests altogether with the assured whether he will abandon or not; and if he do, the underwriter can only be in the same situation as the assured himself would have been in. But it is enough to say that this was not a wagering policy, and that the assured really had the interest which he insured.

GROSE, J. This is not a wagering policy: and I cannot say that a party may not insure an insurable interest for part of the voyage. That makes an end of the question.

LE BLANC, J. The ship, with her cargo, sailed upon a voyage from *St. Ubes* to *Gottenburgh,* and was to go in the way to *Portsmouth* for convoy; therefore the voyage to *Portsmouth* was a part of the intended voyage, and the assured insured their freight for that part of the voyage, and the ship was certainly on the voyage insured when the loss happened: what more can be required to entitle the assured to recover? In the case of *Wooldridge* v. *Boydell,* there was no inception of the voyage insured, which was from *Maryland* to *Cadiz:* the ship never intended to go to *Cadiz,* and therefore could not be said to have sailed upon her voyage to *Cadiz.* Here the voyage to *Portsmouth* was commenced: it was intended to be part of the voyage to *Gottenburgh;* and in case of a loss between *St. Ubes* and *Portsmouth,* the assured would lose the freight he was earning in the course of the entire voyage to *Gottenburgh.* The opinion delivered at nisi prius in the case of *Murdock* v. *Potts,* though entitled to great weight, was not afterwards followed up by taking the opinion of the Court in Bank; and when it now comes for the first time to be considered how far it is [332] reconcileable with other decisions and established principles of insurance law, it cannot be supported. The power of making an

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effectual abandonment in the voyage insured is not a necessary ingredient to shew that the interest is insurable. That point was considered in *Crawford* v. *Lucena* (*a*), and the Judges did not think that such a power was a necessary criterion of an insurable interest. Here too the underwriters were not deceived as to the interest insured.

BAYLEY, J. In case of the ship being lost before her arrival at *Portsmouth*, the assured would lose all their freight upon the entire voyage from *St. Ubes* to *Gottenburgh*, and therefore they had an interest in the whole subject of the insurance during that previous part of the voyage. And it does not vary the risk to say that the assured did not disclose to the underwriters that the ship was to proceed further on a voyage to *Gottenburgh;* for I cannot see what advantage it could have been to them to be informed that the freight insured would not be earned till the ship arrived at *Gottenburgh;* or what disadvantage it was not to receive such information; but the whole subject of insurance was risked during the voyage insured. As to the power of abandonment, that is not necessary to establish a right to insure. An abandonment is the act of the assured, and it is for his benefit that the power is given. The cases cited of a loss before the dividing point, where the voyage insured was to one place, and the real destination to another, turned upon this, that there was no inception of the voyage insured, to the [333] place to which the insurance was made. In one (*b*) of the cases the vessel did not sail for *Cadiz*, to which the voyage was insured: in the other (*c*), instead of sailing from a port of *Newfoundland* to *England*, she sailed for the *Banks of Newfoundland*, though intending afterwards to proceed home. Here the whole freight was in hazard from *St. Ubes* to *Portsmouth*, to which the ship was in the first instance bound.

Postea to the plaintiffs.

(*a*) 2 *New Rep.* 269. (*b*) *Wooldridge* v. *Boydell, Dougl.* 16.
(*c*) *Way* v. *Modigliani*, 2 *Term Rep.* 30.

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The st. 48 *Geo.* 3. *c.* 74. *s.* 15, [334] giving to the party grieved an appeal to the sessions against a conviction by justices of the peace for penalties incurred in respect of the duties on malt, and empowering the sessions "to hear and "*finally* determine of and "concerning "the truth of "the facts and "merits of the "case in question *between* "*the parties* to "such conviction respectively;" and after enabling the sessions to amend defects of form, enacting, in the same clause, that no certiorari shall be allowed to set aside the determination of the sessions; and providing that upon such appeal the sessions shall re-

AN appeal was lodged by the defendant at the general quarter sessions, holden for the county of *Sussex* at *Midsummer* 1811, against a conviction of him, as a maltster, for an offence against the statute 48 G. 3. *c.* 74. *s.* 13.; and the following form of a conviction, signed and sealed by the two convicting magistrates, and written on parchment, was returned to the sessions and filed among the records,

"*Sussex* to wit, Be it remembered that on the 5th day of *June* 1811, at *Steyning*, in the county of *Sussex*, *William Allen*, maltster, was, *on the complaint of Isaac Mann*, he the said *Isaac Mann* being then and there an officer of excise, convicted before us, two of the justices of the peace for the said county of *Sussex*, in the penalty of 200*l.*, in pursuance of an act made in the 48 *G.* 3.; for that he, the said *W. A.*, being a maltster, did within three months now last past, to wit, on the 3d of *April* now last past, at *Gay-Street*, in the parish of *West Chillington*, in the said county of *Sussex*, wet, water, and sprinkle, and cause to be wetted, &c. a large quantity of corn and grain of him the said *W. A.*, to wit, seventy bushels of barley, then and there making into malt, in a certain stage and state of operation, to wit, while the same was on the floor, after the said corn and grain had been emptied, thrown, and taken from and out of the cistern of him the said *W. A.*, used by him for steeping the said corn and grain, before the full end and expiration of twelve days, or 288 hours, from the time when the corn and grain had been so as aforesaid emptied, thrown, and taken from and out of the said cistern; whereby he the said *W. A.* being such maltster as aforesaid, forfeited the said sum of 200*l.*" This was signed and sealed by the magistrates, and bore date the 5th of *June* 1811. It appeared in evidence upon the trial of the appeal, that after the information was exhibited, and the evidence laid before the convicting

hear, re-examine, and re-consider the truth of the facts and merits of the case, &c., and re-examine the same witnesses as before, and no other; does not preclude the crown from removing the conviction, and the order of the sessions quashing the same, by certiorari.

And this Court will take cognizance of a case reserved by the sessions, accompanying the proceedings so removed.

And where the sessions, upon proof that the appellant had received from the clerk of the convicting magistrates a copy of his conviction, signed and sealed by such justices, purporting, on the face of it, to have been made *upon the information of* B. *and* C.; (though such copy was drawn up on the back of the paper which contained the information of *A.* (the true informer; *B.* and *C.* being only the witnesses who had been examined in support of the charge;) and though the same justices had returned to the sessions to be filed of record a regular conviction of the same date, signed and sealed by them, on parchment; stating it to have been made on the information of *A.*, and supported by the evidence of *B.* and *C.* according to the truth of the case;) had quashed the latter conviction so returned by the justices, as being at variance with the minutes of the conviction delivered to the appellant, without entering into the merits of the case, upon a preliminary objection taken by the appellant; this Court quashed the order of sessions generally; thereby setting up again the regular conviction; considering that the variance arose from the mere mistake and irregularity of the justice's clerk; and that the appellant was not really surprised by it, but had waved his appeal on the merits.

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magistrates,* and they had proceeded to convict the appellant, the following form of conviction was at that time regularly signed and sealed by the convicting magistrates.

"Be it remembered that on the 5th of *June*, 1811, *William Allen* was, *on the complaint of* William Bourne *and* Isaac Oatley, they the said *W. Bourne* and *I. Oatley* then and there being officers of excise, convicted before us, two of His Majesty's justices of the peace for the county of *Sussex*, in the penalty of 200*l.*, in pursuance of an act made in the 48 *G.* 3., for having wetted, watered, or sprinkled, or caused to be wetted, &c., corn or grain making into malt, after the same had been emptied, thrown, or taken from or out of the cistern, uting fat, or other vessel or utensil used for steeping such corn or grain, before the end or expiration of twelve days or 288 hours." This was signed and sealed by the same magistrates, and bore the same date as the conviction returned to the sessions, and was produced to the sessions on the part of the appellant. It was written on the back of the information, on paper, not on parchment; which information was *on the complaint of* Isaac Mann, and not on the complaint of *W. Bourne* and *I. Oatley*, who were witnesses in support of the information. This latter form was not returned or filed on the records of the session, though the appellant applied to the Court to have it so filed; which application was refused. It also appeared in evidence that the appellant, for the purpose of preferring his appeal, about a fortnight after the hearing of the information before the convicting magistrates, applied to their clerk for a copy of the conviction, and that the clerk had delivered to him a copy of the form *last* above set forth. The

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clerk stated at the trial that he believed he had previously spoken to the magistrates on the subject. The respondents proposed to support by evidence the form *first* mentioned. The Court considered the last mentioned as minutes or memoranda of the conviction, and quashed the other so written on parchment, and returned to the sessions as above stated, on the ground of the variance of that conviction from the above minutes so written on the back of the information, without going into the merits.

This case now came before the Court on two rules, one obtained by the defendant for quashing the writ of certiorari for removing the conviction and order of sessions into this court: the other, obtained on the part of the crown for quashing the order of sessions; which was in effect to set up again the conviction of the defendant returned by the convicting magistrates to the sessions.

The Attorney-General (with whom were *Courthope* and *Roe*) first shewed cause against the rule for quashing the certiorari; and re-

ferred to the 15th section of the stat. 48 *G.* 3. *c.* 74., which reciting that doubts had arisen whether any appeal lay to the sessions from a conviction of justices for penalties in respect of the duties on malt; for obviating such doubts, declares and enacts that the party aggrieved by any such conviction may have such an appeal: and then it empowers the justices in sessions "to hear and finally de- "termine of and concerning the truth of the facts and merits of "the case in question between the parties to such judgment, &c. "or conviction respectively." And after enabling the sessions to amend defects of form in the conviction, it proceeds thus; "and [337] "no writ of certiorari shall be allowed or brought to set aside any "order, &c. of the sessions. Provided that upon every such appeal "the sessions shall proceeed to re-hear, re-examine, and re-consider "the truth of the facts, and the merits of the case in question be- "tween the parties, &c. and to re-examine thereto upon oath the "same witnesses or any of them, and no other, who shall have "been before examined upon oath as witnesses before the justices, "&c. at the original hearing, on which the conviction, &c. so ap- "pealed from was made." This provision, he contended, did not restrain the crown from removing the conviction by certiorari; which was the present case; the king not being bound, according to the known rule of law, by the general words of a statute, unless specially named. And there was a good reason, he said, for the distinction in the particular instance; for if a party convicted were at liberty to sue out a certiorari to remove the conviction, it would frequently be done for the mere purpose of delay; but the crown can have no such object. Though if the crown were restrained in this respect, it would sometimes operate to the prejudice of the subject, as well as of the revenue; for, as *Attorney-General*, he had in several instances assisted defendants against whom a doubtful judgment had been given below, to have their cases reconsidered, by applying for the certiorari on the part of the crown; without which they would have been concluded. [*Le Blanc*, J. referred to *The King* v. *The Inhabitants of Cumberland*, where first in this court (*a*), and afterwards in the House of Lords (*b*), it was held that the crown was not restrained from suing out a writ of certiorari [338] to remove an indictment, upon the general words of an act taking away the certiorari.]

Burrough and *D'Oyley*, contrà, admitted the general rule, as to the prerogative, but argued from the general wording of the clause in question, that the crown was intended to be bound as well as the

(*a*) 6 *Term Rep.* 194. (*b*) 3 *Bos. & Pull.* 354.

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subject, which may be done by reasonable implication, without express words. Thus in *The King* v. *Davies* (*a*), *Buller*, J. said, "the general rule is that where certiorari is taken away by act of parliament, the crown is not included in the restriction, unless there be some words in the act to shew that the legislature so intended it;" and *Grose* J. said, "the crown is not bound by the general words of a statute, unless it appears upon the face of it that the legislature intended that the crown should be bound." Here, they observed, that the words taking away the certiorari are introduced into the body of the same clause giving the appeal, which is peculiar to this case; and the appeal is to be heard upon the evidence of the same witnesses as were examined upon the original conviction; and the same clause directs the sessions to amend all defects of form upon such re-hearing; and empowers them "*finally* to determine of and concerning the truth of the facts and merits of the case in question *between the parties* to such judgment, &c. or conviction respectively." Then as the only parties are the king, (not the exciseman, who, in laying the information before the justices, acts merely as the servant, and for the benefit of the crown,) and the
[339] subject charged, those words are equivalent to saying that the judgment of the session shall be final between *The King and the defendant*, and therefore is equivalent to express words binding the crown. [*The Attorney-General* referred to the 25th section of the act, which gives a moiety of the penalties to the informer, who shall *inform* or *sue* for the same, and whom the legislature must have considered as the other *party* to the suit against the defendant; for the King would not have been thus generally described.] This observation, they answered, did not vary the argument, since all penalties would go to the crown if not given to another; and giving a part of it to the officer and servant of the crown, as such, by way of encouragement for the benefit of the crown, was in effect the same thing. They distinguished the present from the former cases: from the case of *The Inhabitants of Cumberland* (*b*); because if the crown could not have removed the trial of the indictment out of the county, the defendants themselves would have been the triers: from *The King* v. *Davies* (*c*); because no intention to bind the crown could be collected from the general words of the stat. 25 *G.* 3. *c.* 36., relative to indictments for keeping disorderly houses: from *The King* v. *The Inhabitants of Bodenham* (*d*): upon the general highway act, which says, "that no indictment shall be

(*a*) 5 *Term Rep.* 628, 9.
(*b*) 6 *Term Rep.* 194.
(*c*) 5 *Term Rep.* 626.
(*d*) *Cowp.* 78.

removed by certiorari, until such indictment be *traversed*, and judgment given therein:" which shewed that the legislature only meant to restrain defendants, who alone *traverse:* and from *The King* v. *Tindal and Others*, in this Court on the 8th of *February*, 1754, where the *Attorney-General* moved for a certiorari to remove a conviction of a glassmaker: and the objection was raised on the [340] statute 13 *G.* 2. *c.* 18. *s.* 5., which, for preventing *vexatious delays* and expense occasioned by suing forth writs of certiorari, enacts that none shall be granted to remove any conviction, unless applied for within six calendar months after, and unless it be duly proved on oath that the party suing forth the same has given six days' notice in writing to the convicting justices. And these expressions were relied upon by the Court, as shewing that the legislature could not have intended to bind the King, to whom no vexation or delay could be imputed. The King has a prerogative to try his suit in what Court he pleases, but he can only have it reviewed by way of writ of error or appeal in the court appointed for that purpose by the law: and of that description is the proceeding in question; for it restrains the sessions to the examination of the same witnesses who were examined by the convicting justices.

GROSE, J. (*a*). The question is whether the act of the 48 *G.* 3. intended to take from the crown the power of removing this conviction by certiorari: for it is clear that unless the act has plainly said so, the power of the crown is not restrained. There are no words expressly taking it away. Then was it the clear intention of the legislature so to do? for I admit that if there were such a clear intention, whether it was declared in express words or otherwise, the crown would be restrained. This, it is to be observed, is an excise law, passed for the better collection of the revenue, which is open to a different consideration in this respect from ordinary cases; and considering how necessary such a power is for the [341] crown in these cases, if it had been the intention of the legislature to take from the crown the certiorari, can it be supposed that they would not have taken it away by express words?

LE BLANC, J. The question whether the certiorari shall be quashed depends upon whether it has improvidently issued at the instance of the crown. It is admitted that a statute saying in general terms that the decision of the sessions shall be final, or that the proceedings shall not be removed by certiorari, or the like, will not take it away at the instance of the crown; for there are many cases to that effect, several of which have been reported, and to

(*a*) Lord *Ellenborough*, C. J. was absent.

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these may be added *The King* v. *Tindal.* If on looking into any act which takes away the writ of certiorari in a particular instance, the Court does not see that the crown was intended to be barred, they will not restrain it. The act in question was passed for the better collection of the malt duties, that is, with the least detriment to the revenue. The 15th clause recites doubts whether an appeal lay in certain cases of penalties or forfeitures relating to those duties against the decision of magistrates; for obviating which it gives an appeal to the sessions, and says that their determination concerning the truth of the facts and merits of the case between the parties shall be final: and after empowering the sessions to correct and amend defects of form, it says that no certiorari shall be allowed or brought to set aside their determination. It first clears up the doubt whether the party convicted could appeal; and therefore it is plain that it meant to give a privilege to the subject upon conviction, to have his cause re-heard, but not to take away the pre-
[342] rogative of the crown. Therefore, as, according to the general rule, the prerogative is not taken away, unless by clear words manifesting such an intention; and no such intention is apparent in this act; I agree that it is not taken away, and therefore that the writ has not improvidently issued at the instance of the crown.

BAYLEY, J. It is a known rule, that general words in an act, that no certiorari shall be allowed, or the like, shall not bind the crown, unless such an intention is to be collected from other parts of the act: and I agree that no such intent is to be collected from the act in question. The subject had of right no appeal from the conviction, unless it were given him by act of parliament; but the crown, as well as the subject, had a right to remove the proceeding by certiorari, unless that right were taken away. Then the 15th clause seems to contemplate the condition of a defendant, and of a defendant only, in having the case revised. It recites the doubt whether he had any appeal from the conviction, and it gives the appeal and the right to have the witnesses heard de novo before the sessions, but says that no certiorari shall be allowed. The fair meaning of which is that the party convicted shall have an appeal, in which the merits of his case shall be re-considered, but that he shall no longer have the benefit of the writ of certiorari. This leaves the right of the crown untouched. It is said that this is to bring before the Court in review the decision of the sessions upon the merits; but the sessions were to decide upon the merits, and no writ of certiorari would enable us to review the merits. The justices here however have decided nothing upon the merits; they only say in effect that they wish this Court to decide upon the

matter* stated; and they state certain facts to us, which shew that they did not quash the conviction upon the merits; and upon this I agree that there is nothing in the general words of this act to take away the right of the crown to remove the proceedings by certiorari. 1812. The KING *against* ALLEN. [*343]

Burrough and *D'Oyley* then shewed cause against the other rule for quashing the order of sessions; and contended, first, that no cause could be reserved by the sessions on a conviction, more than upon an indictment; in which latter case the Court, in *The King* v. *The Inhabitants of Salop* (*a*), refused to take notice of a case reserved, which was returned with the indictment and proceedings thereupon by certiorari. A conviction is no other than a speedy and summary remedy in the place of an indictment, and must be governed by the same rule, as being within the same reason. Supposing, however, that the Court would take cognizance of the case reserved, they contend that the sessions had done right in quashing the second conviction returned to that Court, after a complete conviction had been signed and sealed, and a copy of it given to the defendant on his application, against which he had appealed. The two convictions are essentially different, and the second cannot be taken as a more formal record, and the first as the minutes merely of the same transaction; for the one is upon the information of different persons from the other. The justices were functi officio as to the same offence, after having drawn up and issued the first conviction; like the case of arbitrators, who cannot alter their award after they have published it. The first was issued under the hands and seals of the justices, and cannot therefore be considered as the mere memoranda of a conviction. [344] It agrees with the form of conviction given in the act. If such a practice as this could be supported, it would be a trap to a defendant, who is entitled by law to have a copy of his conviction against which an appeal is given to him. Every person has a right to a copy of a record in which he is interested, except as that right may be restrained by the rule at the *Old Bailey* (*b*). In *The King* v. *Midlam* (*c*), Lord *Mansfield* said that the defendant was entitled to a copy of his conviction on the game laws from the convicting magistrate; though it were only wanted in that case for a collateral purpose, namely, to protect himself, from an action brought by the prosecutor for the same offence. The rest of the Court also concurred in this; and Mr. Justice *Yates* said that "the justice ought

(*a*) 13 *East*, 95. (*b*) *Kel.* 3. Vide *Legatt* v. *Tollervey*, 14 *East*, 302.
(*c*) 3 *Burr.* 1721.

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to have given the defendant a copy of the conviction; for it was a record, and the defendant was entitled to it." So in *Reckhouse* v. *Treslove and Levi*, in *C. B.*, on the 21st of *May* 1784, upon a special case reserved in an action of trespass, Lord *Loughborough*, C. J. said: "If you had gone to the justices and asked for a copy of the conviction, they would have given it to you." Here the defendant, having received his copy signed and sealed from the justices, the Court will presume that they did their duty in giving him a true copy of the conviction, against which he was to appeal, and not merely of the minutes of it. This is different from *The King* v. *Barker* (*a*) where the Court refused a criminal information against magistrates for having returned to a certiorari, a
[345] conviction more formally drawn up than the minutes of the same conviction of which they had given the party a copy, before it had been signed by them, upon a request from him for a copy of the warrant of distress and of the proceedings on which the magistrates had granted it.

The Attorney-General (with whom were *Courthope* and *Rce*) said that the case had been reserved with the consent of both parties, and that it was only upon such an understanding between them that the defendant had obtained a conditional judgment below in his favour. That special cases had been often reserved upon convictions for penalties on appeal at the sessions; and he instanced *Rex* v. *Cook* (*b*), and *Rex* v. *Redfearne* (*c*). That the Court were in no instance bound to decide cases referred to them from the sessions; but it had been the practice to do so; and this applied to cases of convictions as well as of settlement: and in no instance had they refused to take notice of a case reserved, except upon an indictment at the sessions, which had been lately attempted (*d*). The present question, he observed, was raised upon a mere mistake of the convicting magistrates, who, in the copy delivered to the defendant, had inadvertently stated the conviction to be on the information of the two persons who had been examined as witnesses in support of the original information preferred by *Isaac Mann* the excise officer; when it appeared by the very paper, on the back of which it was written, that the information had been laid by *Isaac Mann*. And this mistake was afterwards corrected by a regular conviction, returned by the magistrates and filed at
[346] the sessions, of which alone that Court could take cognizance. It might as well be disputed by a Court of Error that the record sent

(*a*) 1 *East*, 186. (*b*) 3 *Term Rep.* 519. (*c*) 4 *Term Rep.* 273.
(*d*) *Rex.* v. *Inhabitants of Salop*, 13 *East*, 95.

in by the court below was the true record. He was then stopped by *the Court*, who said that he need not trouble himself further.

GROSE, J. This rule must be made absolute. The course which has been taken is the least expensive mode of bringing forward the question for the decision of the Court.

LE BLANC, J. It has been the practice before to reserve cases from the sessions upon convictions, and there was good reason for doing it upon the present occasion. If the justices had acted wrong in returning an improper conviction to the sessions, they would be punishable; but it clearly appears that the copy delivered to the defendant was drawn up in the form in which he received it by mere mistake; for it was drawn up on the back of the information of the very person who was the true informer.

BAYLEY, J. concurred.

It was then contended on the part of the defendant, that the rule should not be made absolute in the terms of it, as that would conclude the defendant from discussing the merits of the conviction on his appeal to the sessions; but that the case ought to be sent down to be heard on the merits, which had not been done on the former occasion, by reason of the preliminary objection taken having been there decided in favour of the defendant. But this was resisted by the *Attorney-General*, as creating great delay, and [347] because the defendant had been warned at the time that, if he stood upon the preliminary objection, he would lose the opportunity of entering into the merits of his appeal. That the appeal was only given to the then *next* sessions. To this it was answered, that the appeal had been lodged at the then next sessions, and that difficulty would be obviated by entering an adjournment. That the defendant was surprised at the time by the production of a conviction returned to the sessions different from that of which he had received a copy, and against which he had given notice of appeal. But *Bayley*, J. said that if the defendant were taken by surprise at the former sessions by the production of the conviction returned, he should have then applied for further time: but he must have known that the copy delivered to him was a mere mistake and irregularity of the justices' clerk. And all *the Court* agreed that as the defendant had chosen to stand upon the objection which he then took, he had waved entering into the merits of the case upon the appeal; and therefore they made this rule absolute.

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The KING *against* The Inhabitants of OVERNORTON.

An unmarried man agreed on the 17th of [348] *October* 1803, to serve a master for *the year*, at 9*s.* 6*d.* a-week; and received those wages till the 13th of *October* 1804; three or four days before which (having in the mean time married) he agreed with his master to serve him for *another year*, at 10*s.* a-week, which sum he received on the 20th of *October*, and served more than a year afterwards: Held that this was evidence upon which the sessions might draw the conclusion that the original hiring was for the space of a year, and not merely for the current year of 1803, and that there was a sufficient service for a [349] year, coupled with such hiring, to gain a settlement.

THE sessions, on appeal, discharged an order of two justices for the removal of *William Biggerstaffe*, his wife, and their children, from the hamlet of *Overnorton* to the parish of *Great Rollright*, both in the county of *Oxford*; subject to the opinion of this Court on the following case.

On *Monday* after *Michaelmas-day*, viz. on the 17th of *October*, 1803. *William Biggerstaffe*, the pauper was hired to serve Mr. *Jolly* of *Overnorton*, for the *year*, at 9*s.* 6*d.* per week. He served under that hiring, and regularly received the 9*s.* 6*d.* every week, either on the *Saturday* or *Monday* following, till the 13th of *October*, on which day for the last time he received 9*s.* 6*d.* Three or four days previous to the 13th of *October*, he had a conversation with his master, and agreed to serve him for *another year* at 10*s.* a week. On the 20th of October he received 10*s.*, concerning which no explanation took place at the time; but the pauper said in evidence, that he received it under the *new* hiring. He continued in the service all that year and seven weeks after. He was married eight weeks after the first hiring.

Nicholls, *Abbott*, and *Peers*, in support of the order of sessions, said there was no doubt but that this was an original hiring for a year: and the only question which could be raised was whether it was put an end to before the end of the year; which was a question of fact, and had been decided by the sessions in the negative. There was merely an increase of wages within the year.

Mackaness contrà, first contended that the hiring at so much a week for *the* year, must mean the *current* year, *i. e.* 1803. [But *the Court* said that the justices were to determine what year was meant, and they had considered that it was for the space of a year from the hiring,] Then he contended that the first hiring was put an end to on the 13th of *October*, before that year was expired; and then the pauper, being married (*a*), could not gain a settlement under the second hiring; according to *The King* v. *Chilton* (*b*).

GROSE, J. (*c*). Whatever the decisions might originally have been upon the construction of the statute, the rule of law is now inveterate, that if the justices find a hiring for a year, and a continued service for a year, though not under the same hiring, that is decisive to give a settlement.

(*a*) See stat. 8 & 9 *W.* 3. *c.* 30. (*b*) 5 *Term Rep.* 672.
(*c*) Lord *Ellenborough*, C. J. was absent.

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LE BLANC, J. The sessions would have done better not to have found any special case; for strictly speaking it is a question of fact, whether the first contract was intended to be for the space of a year, or only to the end of the current year. But if they thought it was only to enure to the end of the current year, they would have come to a different decision. But, however equivocal the expression might have been at first, when the master and servant on the 13th of *October*, in the following year spoke of a contract for *another year*, that shewed that they had originally intended a yearly hiring. Then there was clearly a continued service of the same description for a year.

BAYLEY, J. The Sessions were the proper judges to draw the conclusion, as to whether the original contract was dissolved before the end of the year; and I cannot say they have done wrong. There was no reason for dissolving it.

Order of Sessions confirmed.

The KING *against* The Inhabitants of STANLEY cum WRENTHORPE.

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Evidence of a settlement in *A.*, by shewing that the pauper's grandfather came into *B.*, under a certificate from *A.*, is rebutted by shewing that *B.* had relieved the pauper and his family while residing in other places.

PETER MUSGRAVE, his wife and child, were removed by an order of two justices from the township of *Leeds* to the township of *Stanley cum Wrenthorpe* in the *West Riding of Yorkshire*. The Sessions, on appeal, confirmed the order, subject to the opinion of this Court on the following case.

On hearing of the appeal it was proved that *Joseph Musgrave*, the grandfather of the pauper, *Elizabeth* his wife, and *Elizabeth* his daughter, came into the township of *Stanley with Wrenthorpe*, with a certificate from *Ossett*, in the *West Riding*, dated the 5th of *December*, 1727, owning them to be legally settled in the township of *Ossett*. No evidence was given of the pauper, his father, or grandfather, having gained a settlement in any other place since the date of the certificate: but it was proved and admitted that the pauper and his family had been relieved at different times by the overseers of *Stanley with Wrenthorpe*, when residing at *Leeds*, and also whilst residing at *Wakefield*. Upon this evidence the Court confirmed the order.

J. Williams, in support of the orders, after mentioning *The King* v. *Wakefield* (*a*), where proof of the parish having relieved the

(*a*) 5 *East*, 335.

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pauper's father forty years before, while residing out of it, was held to be primâ facie evidence of a derivative settlement there, was stopped by the Court.

* *Littledale*, contrà, contended that the fair presumption from the evidence was that the pauper was inhabiting in the township of *Stanley* under the certificate from *Ossett* given to the grandfather; no subsequent settlement having been shewn: and *Stanley* might have given casual relief, without meaning to abandon the certificate.

But *The Court* (*a*) were clearly of opinion that the sessions had drawn the right conclusion. *Le Blanc*, J. said that there was nothing to rebut the presumption of a settlement in *Stanley* from the repeated acts of relief while the pauper and his family were residing out of the township. And *Bayley*, J. asked what there was in the case to shew a derivative settlement under the grandfather still continuing. There was ample time intervening for the father to have been emancipated as well as the pauper himself: and there was no reason why the township of *Stanley*, who must have known the fact, should have relieved the pauper while residing in other townships, if they had not known that he was settled with them.

Orders confirmed.

(*a*) Lord *Ellenborough*, C. J. was absent.

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A poor boy of *A.*, 16 years of age, offered to serve a parishioner of *B.*, who asked him if he was willing to bind hay, &c., and do whatever else he was bid; to which the boy said he was willing; and the other took him home to *B.*; but a day or two afterwards told the boy he could not keep him if he could not get better clothes, when the boy said that the overseer of *A.* would find him clothes; and the next day accompanied his master to the overseer of *A.*, who agreed to find clothes, but stipulated with the master, and the latter agreed to pay the overseer 1*s.* a-week for the parish, on account of the clothes found. The overseer at the same time asked the boy, in the master's presence, if he went willingly into the master's service; to which the boy assented. Held that this was a contract of hiring by the boy himself, and not merely by the overseer, under which a settlement might be gained by a year's service.

TWO justices, by their order, removed *Benjamin Collins* from the parish of *Ingrave* to the parish of *Dunton*, both in the county of *Essex*; which order was confirmed by the sessions, on appeal, subject to the opinion of this Court on the following case.

Benjamin Collins, before he lived with *Smith*, as after mentioned, belonged to *Dunton*. Previously to *Michaelmas*, 1809, he went to one *Eastwood* in the parish of *East Horndon*, and worked for him for some time at 6*d.* a-day. Afterwards he was taken into *Eastwood's* house, where he lived two years in his employment. On leaving *Eastwood's* service, (by which it is admitted that no settlement was gained, as the pauper was sent into it by the overseer of

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Dunton without any act of his own) and in his way to *Dunton*, he was met in a field by a labourer, who said to him, "Do you want a service? You would suit *Smith*". *Smith* being in the field at the time, the pauper immediately applied to him; when *Smith* said to him, "Are you willing to go with me, and bind hay, or thatch, or do whatever else you are bidden?" The pauper said he was willing; and *Smith* took him home to his house in the parish of *Ingrave*. This happened a little before *Michaelmas* 1809, and the pauper was then about 16 years of age. Nothing was said about wages; and neither then, nor at any other time, was any other agreement made between the pauper and *Smith*. A day or [353] two afterwards *Smith* said, "I see you are in a bad state about clothes; if you cannot get clothes, I cannot keep you." The pauper replied, "Mr. *Maunder*, the overseer of *Dunton*, will find me clothes." On the next day the pauper and *Smith* went to *Maunder*, when *Maunder* undertook to provide clothes, and asked *Smith* what he would give him a-week. *Smith* engaged to pay one shilling a-week *to* Maunder *for the parish, on account of clothes found.* The overseer then gave an order for the clothes that the pauper wanted. *Maunder*, in the presence of *Smith*, asked the pauper if he went willingly into *Smith*'s service. The pauper replied that he did. *Smith*, during the service, occasionally gave the pauper small sums. About four months after the pauper had been in the service of *Smith*, the latter, unaccompanied by the pauper, and without his knowledge, went to the overseer and told him that he could not keep the pauper any longer if he was to pay the one shilling a-week. The overseer released *Smith* from the payment, and the pauper staid the year out in *Smith*'s service. At *Michaelmas* 1810 *Smith* said to *Maunder*, that he would have the pauper no longer without fresh clothes: to which *Maunder* said that he must wait till the town-meeting, which would take place in a fortnight. The overseer then asked the pauper, if he was willing to live with *Smith* another year? He said, that he was willing, as he used him very well. The overseer asked *Smith* to make the pauper some allowance. *Smith* promised to give him a pair of shoes, and to do the best he could for him. The pauper served the second year with *Smith*, who gave him a pair of shoes, and laid out 1*l.* 8*s.* 6*d.* in the purchase of clothes for him. The Sessions were of opinion that a settlement was not gained in the parish of *Ingrave*.

Pooley and *Boucher*, in support of the orders, argued that there [354] was no contract of hiring between the pauper and *Smith*, but the contract, if any, was between *Smith* and *Maunder*, the overseer of *Dunton*, which was the pauper's original place of settlement. The

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case of *Gregory Stoke* v. *Pitminster* (*a*), long ago decided that the taking and employment of a poor boy as an act of charity, without any contract of hiring, though acts of service were performed by him, would not give a settlement. And in *The King* v. *Rickinghall Inferior* (*b*), a pauper placed by the parish officers with a parishioner, for whom he was to work upon certain terms agreed upon between the officers and the parishioner, was not considerd as a contracted servant. Here the decision of the sessions is equivalent to a finding that there was no contract; and that is warranted by the facts, that though the pauper and *Smith* had communication upon the subject of *Smith*'s employing the pauper before the intervention of the parish officer, yet before any thing was concluded, *Smith* had refused to keep the boy without he could get clothes, when the latter referred him to the parish officer, with whom *Smith* afterwards made the contract, reserving the weekly payment to be made to the parish, and not to the boy, to reimburse them the expense of the clothes. And when *Smith* intended to put an end to the agreement, he applied to the overseer, without the knowledge of the boy, and declared he would not have him any longer without fresh clothes. They also referred to *The King* v. *Stowmarket* (*c*).

Bosanquet and *Knox*, contrà, were stopped by the Court.

[355] GROSE, J. (*d*) The question is whether the contract was made by the master with the boy, or with the overseer? Now, the boy offered and declared himself willing to serve the master, and the master agreed to take the boy, before any intervention of the parish officer: and though facts are afterwards stated to shew that reference was made to the officer, yet that was only to enable the boy to make the contract by getting clothes from the overseer, without which the master refused to keep him.

LE BLANC, J. Here there was an original agreement for a hiring and service between the boy and his master, before the overseer knew any thing of the matter; how then can it be said to be a contract made between the master and the overseer for the letting out of the boy, without the real assent of the latter? The law indeed says, that an overseer cannot contract with another for the services of a pauper without his consent: but there is no law which says that an overseer may not furnish a pauper with clothes to enable him to make a contract of hiring with another. When *Smith* objected to keeping the boy for want of clothes, the latter said he would apply to the overseer, who was to him in loco parentis: and it is true that when the master met the overseer, it

(*a*) *Sess. Ca.* 132. *c.* 120. *Const's Bott.* 326. (*b*) 7 *East*, 373.
(*c*) 9 *East*, 211. (*d*) Lord *Ellenborough*, C. J. was absent.

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was agreed between them that the master should pay the other 1*s.* a-week for the parish, to reimburse them the expense of the clothes: but the overseer himself, in *Smith*'s presence, asked the boy if he were willing to go into *Smith*'s service; and the boy answered that he was willing.

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BAYLEY, J. The boy acted throughout suo jure: he chose his own master, and fixed his own terms; and, therefore, I see no objection to his gaining a settlement under the contract of hiring made by him.

Order quashed.

The KING *against* The Inhabitants of OWERSBY-LE-MOOR.

Thursday, April 23d.

TWO justices by their order removed *Mary* the widow of *William Saltfleet*, deceased, late of *Maltby-le-Marsh*, schoolmaster, and their children, from the said parish to the parish of *Owersby-le-Moor*, North End, both in the parts of *Lindsey*, in the county of *Lincoln*. The sessions, on appeal, confirmed the order, subject to the opinion of this Court on the following case:

Under a devise by *B.* to trustees in fee of a certain farm, upon trust to dispose of the rents, issues and profits, as to 40*s.* a-year to the poor of the parish, and the residue to be paid to a schoolmaster, to be nominated by

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In the year 1705, Mrs. *Bolle* devised, amongst other things, a farm in *Maltby-le-Marsh*, and all thereto belonging, to certain persons named in her will and to their heirs, in trust that they and the survivors or survivor of them, and the heirs and assigns of such survivor, should for ever after her decease employ and dispose of all the rents, issues, and profits of the said farm, in the manner following; that is to say, that out of the rents of the said premises there should be yearly for ever paid to the poor of the said town 40*s.*, in such proportions as the minister and officers of the said town for the time being should direct and appoint; and that all the rest of the rents of the said farm should be yearly for ever paid to a fit person to be from time to time *nominated and elected by the said* them, to teach the poor children to read the Bible; the trustees, by an agreement in writing, reciting that they were possessed of and entitled to a school-

house, yard, garden, and premises at *M.*, which they had agreed to let to *W. S.* for the purposes mentioned, thereby agreed with *W. S.* to let him have the possession, use, and occupation of the schoolhouse, &c. and premises, *for the purpose of teaching the poor children of* M. *to read in the Bible, pursuant to the will of* B.: and in consideration of his agreeing to teach the said children, he was to reside on the premises rent-free, and to be paid a certain annual sum by the trustees; who reserved to themselves a power, for reasonable cause, to suspend his salary, and that in case of his death they should turn his executors out of the premises, and appoint another schoolmaster thereto. Held that this was an appointment, though irregular in its form, of *W. S.*, under the will, *as schoolmaster*, so as to give him a life interest in the school-house, &c. and premises, of which he was put in possession, and to enable him to gain a settlement by 40 days' residence thereon; though the trustees fraudulently withheld from him part of the rents, issues, and profits of the trust estate: and that the finding of the sessions, "that the appointment was fraudulent and in no respect consistent with the will," was to be understood in that sense only, and not as imputing fraud to the schoolmaster himself, who was thus wronged, and who engaged to execute all the duties of his appointment under the will.

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trustees, who should be a *schoolmaster,* to teach the poor children of the said town of *Maltby* to read the Bible. On the 13th of *June* 1807, the following agreement was entered into between *William Saltfleet,* (the husband of the pauper), and *James Digby* and *Catherine Digby* his wife, (the heir at law of the only surviving trustee appointed by the said will.) Memorandum of an agreement made 13th of *June* 1807, between *James Digby* and *Catherine* his wife, of the one part, and *William Saltfleet,* schoolmaster of the other part. Whereas the said *James Digby,* in right of *Catherine* his wife, is possessed of or entitled to a certain schoolhouse, yard, garden, and premises, situated at *Maltby,* in the county of *Lincoln,* which they have agreed to *let* unto the said *William Saltfleet* for the purpose, and in the manuer, as is hereinafter mentioned; it is hereby agreed by and between the said parties hereto, *that the said* William Saltfleet *shall have the possession and the use and occupation of the said schoolhouse, yard, garden, and premises, for the purpose of teaching the poor children of the said parish of* Maltby *to read in the Bible, pursuant to the will, devise, and bequest of Mrs.* Bolle *deceased:* and in consideration of the said *William Saltfleet* agreeing to teach the said poor children
[358] of the said parish of *Maltby* to read in the Bible as aforesaid, *he the said* William Saltfleet *is to reside upon the said premises rent free, and to be paid and allowed by the said* James Digby *and* Catherine *his wife,* or the survivor of them, or the heirs, executors, &c. of the said *Catherine Digby,* a *salary, for the first year that he shall so teach, of* 10*l.* such year to commence from 1st of *August* next; and the sum of 15*l.* for every year after that he shall so continue to teach the said poor children to read in the Bible as aforesaid. And the said *James Digby* for himself and for the said *Catherine* and her heirs, executors, &c. doth hereby agree to pay or allow unto the said *William Saltfleet* 10*l.* for the first year, and 15*l.* per annum for every year that he shall afterwards continue to teach the said poor children to read in the Bible as aforesaid. And it is hereby agreed by and between the said parties hereto, that in case any fair and reasonable complaint, grounded upon facts, shall be made to the said *James Digby* and *Catherine,* or the survivor of them, or the heirs, &c. of the said *Catherine Digby,* it shall be lawful to and for him, her and them to suspend the salary of the said *William Saltfleet* for two years, and apply the same to such purposes as the said *James* and *Catherine Digby,* &c. shall think proper, without being liable to make any remuneration to the said *William Saltfleet.* And lastly, that in case of the death of the said *William Saltfleet,* it shall be lawful to and for the said *James Digby* and *Catherine* his wife, or the survivor of them, or the heirs, &c. of the said *Catherine,* to turn out from off

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the said premises *the executors, administrators, or assigns* of the said *William Saltfleet*, and *to appoint another person to the situation of schoolmaster thereto*, in such manner as he, she, they, any, or either of them may think proper.

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* *William Saltfleet*, on the 13th of *June*, 1807, entered upon the school-house, yard, and garden, in *Maltby-le-Marsh*, (the premises mentioned in the said agreement, being part of the farm so devised in trust as aforesaid,) and he resided upon those premises till his death, about three years and an half afterwards. He taught the poor children of the parish to read during that time, and received from *James Digby* for the first year a salary of 10*l.*, and afterwards a salary of 15*l.* per annum. The annual value of the school-house, yard, and garden, is about 5*l.* The remainder of the devised premises, consisting of a farm-house, and twenty acres of land, was occupied by *C. Barton*, the tenant of *James Digby*, at the rent of 52*l.* 10*s.* per annum. The Court thought the above appointment *fraudulent*, and in no respect consistent with the will. *W. Saltfleet* was married to the pauper *Mary*, and by her had the children named in the order: and it was admitted that they were settled in *Owersby*, as in the place of the birth of *W. Saltfleet*, unless he gained a subsequent settlement in *Maltby-le-Marsh* under the statement above made.

Clarke, Balguy, jun., and *Shuttleworth*, in support of the orders, contended that *Saltfleet*, not having been appointed schoolmaster under the will of Mrs. *Bolle*, but only under a personal contract with Mr. and Mrs. *Digby*, took no freehold interest in the school-house and premises, and therefore gained no settlement by his occupation of them, being of less than 10*l.* annual value. The trustees had no right to contract with *Saltfleet* in the manner they did, and it was a clear breach of trust in them to appoint the schoolmaster in any other manner than that directed by the will: but still as the freehold of the premises remained in them till an appointment under the will, and *Saltfleet* entered into possession under a personal contract of a different nature, it could not pass to him in a different manner than that appointed by the will; but he was either tenant from year to year, or at will, of a part only of the trust estate; for there is no pretence to say that he was in possession of the rest of the estate by virtue of the contract under which he entered upon the school-house, yard, and garden. [*Le Blanc*, J. That, I suppose, will not be contended for.] Supposing this were to be considered as a lease for life, operating during good behaviour, yet without livery of seisin, no freehold interest in the

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school-house would pass. If an application had been made to the Court of Chancery against the trustee to appoint a schoolmaster in execution of the trust, it would have been no answer to shew such an appointment as this: and if another schoolmaster had been regularly appointed in conformity to the trust, he might have maintained an ejectment against *Saltfleet*. Besides, how can a settlement be gained under an appointment, as conveying an interest, when the sessions have found that the appointment was "fraudulent, and in no respect consistent with the will?"

Burrough, *Denman*, and *Phillips*, contrà, said that the evident meaning of the sessions in their finding was that the appointment was fraudulent and inconsistent with the will, in respect of the conduct of the trustees in withholding from the schoolmaster a part of the profits of his appointment which he was entitled to under the will; but that would not avoid his appointment so far as it went
[361] for the remainder; and that appointment, they contended, gave him a beneficial interest of his own in the school-house, yard, and garden; which was sufficient for the present purpose. The sessions had no authority by their finding to avoid his appointment pro tanto; for that would be to assume a visitorial power. It is immaterial whether the legal freehold interest in the premises passed to him, if he were entitled to the enjoyment of them during good behaviour, which the law considers as a life-interest. He was entitled by his appointment to all the rents, issues, and emoluments of the property. No person could dispossess him but the Lord Chancellor on good cause. The trustees would be estopped by their deed. It can be no ground of objection to the title of a cestuy que trust, that the trustees had executed their trust in his favour in part only, reserving to themselves the remainder in fraud of their own appointment. On application to the Lord Chancellor, so far from turning out *Saltfleet*, he would have compelled the trustees to put him in possession of all the rest of the rents, issues, and profits which he was entitled to. [*Bayley*, J. The trustees were to receive the rents.] But from the nature of the trust he was entitled to the possession of the school-house, which was given up to him. The trustees designate him *schoolmaster* in the agreement, and assume to appoint him such under the will; and when appointed such, he took under the will, and not merely under the agreement: but even the agreement shews an appointment for life; for it provides that in case of his death, it shall be lawful for the trustees to turn his executors out of the premises and appoint another schoolmaster. Then by all the cases, his residing 40 days irremovable on

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the premises in his own right gave him a settlement. They referred to *Natland** v. *Stainton* (*a*), *Rex* v. *Wobourn* (*b*), and *Rex* v. *Wivelingham* (*c*), where persons were settled by residence on their own property, though they had no legal estate in the premises.

The Court (in the absence of Lord *Ellenborough*, C. J.,) said they would consider further of the case; and on the next day *Grose*, J. delivered their opinion. [*362]

We are of opinion that a settlement was obtained in *Maltby-le-Marsh*, and that the order of sessions, and the original order of removal, ought to be quashed. The agreement of the 13th of *June* 1807 was, we think, in substance an appointment of *William Saltfleet* to the situation of schoolmaster, to teach the poor children of *Maltby* to read the Bible: and though the sessions have stated that that appointment was *fraudulent*, and in no respect consistent with the will of Mrs. *Bolle*, it is clear that their meaning is not that it was *a colourable appointment*, under which he was not to discharge the duties of schoolmaster, but that it was an appointment upon such terms as tended to deprive him of a great part of the emolument attached to the situation. There was no fraud in him: he was to discharge every duty the situation of schoolmaster required; but the fraud was in those who appointed him, in attempting to withhold from him what Mrs. *Bolle*'s will entitled him to receive. By that will the schoolmaster was to have all the profits of a farm at *Maltby*, except the yearly sum of 40s., which was to be paid to the poor of the parish. The schoolmaster therefore for [363] the time being was to a considerable extent, to the extent of all but 40s. a-year, the cestuy que trust of that farm; and had the trustees kept in their own hands sufficient to raise the 40s. a-year, and put the rest into the possession of the schoolmaster, they could not have dispossessed him, whilst he continued schoolmaster, unless he had misused the property, or unless what they retained to raise the 40s. a-year had proved insufficient for that purpose. In this case the trustees allowed *William Saltfleet* to have the possession of a house, yard, and garden, which were part of this farm, and they retained what was greatly more than sufficient to answer the 40s. a-year. He had this possession, therefore, not by purchase, so as to be within the st. 9 *Geo.* 1. *c.* 7.; not by renting, so as to be within the st. 13 & 14 *Car.* 2. *c.* 12.; but in the character of cestuy que trust, residing upon what was for the time substantially his own; and as the trustees could not have removed him, we are of opinion that this residence for more than 40 days gave him a settle-

(*a*) *Burr. S. C.* 793. (*b*) *Ib.* 785. (*c*) *Cald.* 121. *Dougl.* 738.

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ment in this parish, and that the removal of his wife and children from this parish cannot be sustained.

Orders quashed.

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American goods in an *American* ship, having been insured on a voyage from *America* to the *Baltic*, with liberty to carry simulated papers, and having been captured and condemned by a *Danish* sentence, which, after suggesting a doubt as to the *English character* of the owner, stated that the positive *contradiction* which the *documents* contained concerning the property of the ship and cargo rendered it impossible to acknowledge them as neutral; and the Prize Court of Appeal afterwards alleging as grounds of confirmation, 1st, That the ship's documents were not in due order; the *sea passport*, ordering that, before it could be considered of value, the captain must take his oath before the officer appointed for that purpose: but that though the passport was made out as if the captain had appeared before *A.B.*, the notary public, and taken his oath, yet that neither the notary's name or seal of office was under the document, and therefore that the sea-letter was to be looked upon as a blank, and no credit could be given to it as a public document: 2dly, that the ship had *false documents*, (which it exemplified by the journal:) 3dly, that the documents disagreed with regard to their contents, (which it exemplified by the bills of lading and letters on board:) 4thly, that a person on board, who seemed to be interested in the ship and cargo, had been set on shore in *England:* 5thly, that false *French* certificates d'origine were found on board. Held that, taking the whole together, the *ground of condemnation* was the having on board *simulated papers*, which, mixed with other circumstances, led to the conclusion that the ship and cargo were hostile *British*, and not neutral *American* property; and that the not having a *sea passport* on board, verified in the manner stated in the sentence, was only a circumstance to shew that the ship carried simulated papers; even if such a passport were required by any treaty between the *United States* and *Denmark*, which did not appear: and, consequently, that the loss was attributable to a cause which the underwriter had sanctioned by the leave to carry simulated papers; and not from the ship's not being properly documented, as an *American* ship ought to be; for which the assured, as owner of the ship, as well as of the goods insured, would have been answerable.

Neither was the condemnation on the ground that the papers had not been properly simulated; so as to attribute the loss to the mere negligence of the assured in the mode of exercising the liberty reserved to them; supposing that would have varied the case.

BELL and others *against* BROMFIELD.

THIS was an action on a policy of insurance upon goods by the ship *Herald*, upon a voyage at and from *Virginia*, in *America*, to her port or ports of discharge in the United Kingdom, or any port or ports, place or places in the *Baltic*, &c. The policy contained *a liberty to carry simulated papers;* and the plaintiffs declared upon a loss by hostile capture; which was proved by shewing that the ship and cargo were captured by a *Danish* privateer, and carried into *Copenhagen*, and by the Danish sentence of condemnation after mentioned. After a verdict for the plaintiffs, at the trial at *Guildhall*, before Lord *Ellenborough*, C. J. it was moved in the last term to set aside the verdict and enter a nonsuit, or to have a new trial on the ground that the ship, being in fact an *American*, although not warranted or represented to be such to the underwriters at the time of effecting the policy, was bound to be documented according to her national character; for which the case of *Bell* v. *Carstairs* (*a*), was cited; and that as it appeared by the sentence of condemnation, read at the trial, that she had been condemned, amongst other reasons, for want of being properly documented as an *American*, and particularly on account of her

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(*a*) 14 *East*, 374.

carrying a defective sea-passport, for want of the captain's affidavit not being signed or sealed; and that the loss therefore was occasioned by the act of the assured themselves, who were owners both of ship and cargo; the underwriters were discharged.

The first sentence of condemnation, dated the 13th of *August* 1810, was as follows: "The ship the *Herald*, commanded by Captain *Barron*, and cleared out from *America* to *Hamburgh*, but stopped on her voyage from *Gottenburgh* to *Stralsund*, is stated to belong to a person of the name of *John Bell*, in *Petersburgh*, in *Virginia*. The cargo is said to belong to the same person, &c. We will not enter into a statement of the facts, which admit of a doubt as to the said *John Bell*'s situation, nor will we allude to the *English character* of this man, and of the expedition; but the positive contradiction which the documents contain, concerning the property of the ship and cargo, render it impossible for us to acknowledge the ship and cargo as neutral. According to the documents stated above, the ship and cargo are stated to belong to [366] one and the same proprietor: the bill of lading, on the contrary, ascertains that freight is to be paid out of the cargo, as per agreement; which is quite incompatible with the account of a single owner: a person can neither agree with nor pay to himself. That a false ship's journal has been held, and that the expedition was bound for *Falmouth*, we think it our duty to add. We consequently judge the ship in question, the *Herald*, Capt. *Barron*, together with her cargo, to be good and lawful prize belonging to *Govertz*, master of a privateer," &c. The final sentence passed on the 3d of *December* 1810, by the Court of Appeal, stated that "the ship in question, the *Herald*, is justly condemned by the Prize Court. 1st, The ship's documents are not in due order. *The sea-passport*, dated 13th of *March*, *orders* that before it can be considered of value, *the captain must take the oath before the officer appointed for this purpose:* but though this passport is made out as if Captain J. *Barron* had appeared before *Archibald Burn*, the notary public, and taken his oath, *still neither this person's name, nor seal of office, is found under the document.* The sea letter of course is to be lookeed upon as a blank, and not as a public document, and no credit can therefore be placed on it. 2dly, The ship has false documents; for the journal contains other facts than what really have taken place; and these are inserted on purpose and in order to conceal the truth: but every thing is left out of the journal respecting the ship's residence in *England:* and as this journal was delivered up to the privateer, it must have been with an intention to deceive him. 3dly, The documents disagree with regard to

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their contents; for notwithstanding it is stated in them that *John Bell* is the owner* of the ship and cargo, the bills of lading still state that freight is to be paid as per agreement; and the cargo is to be delivered to one *Beasley* in *Hamburgh*, whose situation according to the letters found on board, is very suspicious. 4thly, There has been on board the ship a person by the name of *Thomas Smith*, who was set on shore in *Falmouth*, and is said to have been but a passenger; but who, according to the signature upon the contract of hire, seems to have been interested in the ship and cargo. 5thly, Finally, *French* certificates d'origine are found on board, which, being declared in general to be false, must be attended with a presumption against it; and where the other documents are not in due order, this must increase the suspicion against the ship, Upon the above-stated foundation, and those of more facts, tending to prove the connection in which the ship and cargo are with *England*," the Court dismissed the appeal, and confirmed the first sentence of the Prize Court.

Park and *J. W. Warren*, now opposed the rule for entering a nonsuit, &c,; contending that upon the face of the sentences of condemnation, it was evident that the Prize Courts had proceeded upon the ground of the ship's having false documents on board, for which express liberty was reserved by the policy: but there was no fact stated to shew that the ship and cargo were not really *American*, but only the reasoning of the Courts of condemnation, that the property was *English*, from the contradictory nature of the documents accompanying them, which it is stated were not in due order. For though it is also stated by the Prize Court of Appeal, amongst other reasons for the condemnation, that the *sea passport* carried by the ship was defective in certain particulars

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mentioned; yet there is nothing stated to shew that any such document was necessary to be carried by an *American* ship, according to any treaty between the United States of *America* and *Denmark;* and therefore this case is distinguishable from *Bell* v. *Carstairs* (*a*). [They were then stopped by the Court, who called on the defendant's counsel to point out what evidence there was to shew than an *American* ship out to have her sea-passport verified in the manner required by the Prize Court.

Garrow, *Holroyd*, and *Scarlett*, in support of the rule, said that every ship must have some national character, which can only be verified on the part of the ship owners, by shewing that she was properly documented as that character requires, though not

(*a*) 14 *East*, 374.

warranted or represented to be such; which was the very point decided in *Bell* v. *Carstairs*. [*Bayley*, J. That is only where a ship is bound by the law of nations, or by particular treaties with certain states, to carry certain documents.] It is part of the law of nations that every ship should have some documents of her nationality in an authenticated form; and the necessity of this to the ship owners is not dispensed with by the leave to carry simulated papers; for that must be understood of simulated papers purporting on the face of them to be true, in addition to her true and proper national documents. And here credence must be given to the foreign Prize Court, that the *sea passport*, the only *American* document stated, was not authenticated in the accustomed and proper manner. And this defect is alleged as the first and prominent ground of the condemnation, jointly with the falsity of the [369] ship's papers. The Prize Court was competent to decide whether the ship was properly documented according to the law of nations and to treaties between the United States and *Denmark*, and consequently whether she ought to have had a sea passport verified in the manner required; and they have decided in the negative. But further, the leave given to carry simulated papers must be understood to mean papers perfectly simulated upon the face of them; but not to carry papers palpably false upon the face of them, which must necessarily increase instead of diminish the underwriter's risk: so far therefore as the sentence of condemnation shews that the false papers were imperfectly simulated in the very frame of them, that alone would discharge the underwriter.

Lord ELLENBOROUGH, C. J. By the terms of the policy the assured had liberty to carry simulated papers, the effect of which is that the underwriter cannot be discharged from the loss if the sentence of condemnation appear to have been on account of the ship's carrying simulated papers, or if that circumstance, mixed up with other considerations, operated in proportion at all as the ground of the condemnation; for we cannot say in what proportion it weighed with the Court in drawing its conclusion from the conjoint circumstances. It is true that by the law of nations every ship must be documented according to her nation: there cannot be a ship of no nation. But this ship was not condemned on the ground of her not being of any nation, but for the defect and falsehood of the papers which she had on board, which in the judgment of the Court induced them to conclude that she was not a neutral *American*, but *British*. The sentence begins with stating that the ship's documents are not in due order; [370] that the sea passport orders that the captain must take the oath

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before the officer appointed for the purpose; but that though the passport was made out as if the captain had appeared before *A.B.* the notary public, and taken his oath; (how far a notary public had a right to administer the oath does not appear;) yet that neither the notary public's name or seal of office was found under the document, and therefore no credit was to be given to it, &c. (By what authority that form of verification is required does not appear.) What is this but alleging the falsehood of the document, and that no credence was to be given to it as genuine? Then it proceeds more distinctly to state that the condemnation was on the ground of the ship's having false documents, the falsity of which it proceeds to specify. All the language of the sentence shews that it proceeded on the ground of the simulation of the papers: every circumstance stated is an allegatio falsi, and all the reasoning of the Court is with reference to the deceptive nature of the papers found on board. It is no where relied on as a substantive ground of condemnation that the simulation is imperfect, but the main stress of the argument is that there was a simulation. Then if the simulation of papers be the ground or mainly conducive cause of the condemnation, the underwriter cannot object to bear the loss which has accrued on that account; he having agreed that the assured should carry simulated papers. It is frequently difficult from the confused manner in which these sentences are drawn up to collect clearly what was the ground of condemnation in the particular case; yet I think it may be collected in this case that the ground of condemnation was the ship's having simulated documents on board.

[371] GROSE, J. was of the same opinion.

LE BLANC, J. It does not appear that the main ground of condemnation was the not having a sea-letter on board; but the having on board simulated papers, which did not shew her alleged nationality: that the ship's papers were irregular and contradictory: all which shewed that her papers were simulated. It appears then that the Prize Court condemned her for a cause which the underwriters had allowed; for the carrying of simulated papers was the very circumstance which created the confusion of them, for which she was condemned.

BAYLEY, J. The five causes and grounds of condemnation are all stated for the purpose of shewing that the ship and cargo had some connection with *England*, which conclusion is deduced from the irregularity and confusion of her papers: and it is the ground of condemnation only that is conclusive, and not the circumstances which led the Prize Court to draw that conclusion.

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It was not the fact of her not having a sea-letter in the form required which led to that conclusion; but that is adverted to, amongst other things, to shew that her papers were simulated.

Rule discharged.

GOLDSON *against* BUCK.

[372] *Friday, April* 24th.

THIS was an action of trespass brought in the name of the treasurer to the trustees of a paving act for the town of *Portsea*, in the county of *Hants*, passed in the 32 *Geo.* 3. (*c.* 103.) against the defendant for breaking up and damaging a part of the pavement of that town belonging to the trustees; and at the trial at *Winchester*, before *Chambre*, J., a verdict was found for the plaintiff, subject to the opinion of this Court upon the following case.

In the year 1792, the *Portsea* paving act was passed, by the 22d section of which it is enacted, "That after the 25th of *June*, "1792, the property of all the present and future pavements of "the town of *Portsea*, &c. and of all the soil of and in the "streets, &c. and public passages, and of all the cess-pools, "bunnies, water-courses, and sewers in the said town, &c. shall "be vested in the said trustees," who are thereby authorized to bring actions in the name of their treasurer, or to prefer bills of indictment, as the case shall require, against persons who shall break up, damage, or take away any part thereof. This is declared to be a public act. A similar act had passed in 1764, under which considerable progress was made, which was repealed, and further powers granted by this act. Neither of the acts contains any saving, except of the rights of the corporation of *Portsmouth* (*a*). The plaintiff at the time of the alleged trespass was the treasurer to the trustees under this act. On the 22d of *December* 1810 the defendant broke up the pavement in one of the public streets within the town of *Portsea*, for the purpose of laying pipes to convey water from *Farlington*, in the county of *Hants*, to *Portsmouth*; claiming a right to do so under the following title. By stat. 14 *G.* 2. *c.* 43. intituled an act to enable *T. Smith*, Esq.

An act passed in the 14 *Geo.* 2. enabling *T. S.*, *lord of the manor* of *F.*, his heirs, and assigns, at their costs, to convey water in pipes from his estate there to *Portsmouth*, and through the streets, and for that purpose to break up the pavement, making good the same again, is not repealed by the act of the 32 *Geo.* 3., passed above 50 years afterwards, vesting the property and control of the pavement in commissioners, without exception of the former right; the two acts not being inconsistent, but

[373] giving the several powers to be exercised for different purposes. And the waterworks, &c., together with the powers under the first act, may be afterwards executed by the assigns of *Smith*, to whom the same, apart from the manor, were conveyed by mesne assignments; though such powers had lain dormant since seven years after the passing of the act, till the 49 *Geo.* 3. But if *Smith*'s assigns break up the pavement for the purpose of executing the powers reserved to them, without restoring it again, they are amenable either by indictment, or by action, for the injury done to the property of the commissioners.

(*a*) There was a reference to p. 59 of the present paving act.

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lord of ths manor of Farlington, to supply the town of *Portsmouth*, and parts adjacent with good water at his own cost, it is enacted, "That it shall and may be lawful for *T. Smith*, Esq. *lord of the* "*manor of* Farlington, his heirs and assigns, at his and their own "costs, to convey water *from certain springs arising in his said* "*estate in* Farlington, by pipes, &c. to and through the town of "*Portsmouth*, and through every street, &c. to the extremity of "the Point." By sect. 2. "In case the said *T. Smith*, his heirs "and assigns, shall find it needful to lay any pipes *in or near the* "*highway*, it shall and may be lawful so to do, so as he and they "shall sufficiently at his and their own expenses, from time to "time, repair and make good such part of the said highway as "he or they shall so break up as often as need shall require." By sect. 4. "The said *T. Smith*, his heirs and assigns, shall and "may from time to time have full liberty and authority to lay "branches from the main pipes, as aforesaid, *in or through any of* "*the streets*, &c. or places in and about the said town and parts "adjacent, and also to erect water-houses, &c. for the better "supplying the inhabitants thereof: and for the purposes afore-
[374] "said, *to break up the pavements in any of the streets*, common "grounds, or places in and about the said town and parts ad- "adjacent: also to sink trenches for laying and repairing the pipes, "&c. from time to time as need shall require: he and they mak- "ing good the said pavements, and taking away the rubbish," &c. By sect. 8. (p. 13.) this act is declared to be a public one, and that it shall be beneficially expounded for effecting the purposes aforesaid; and the plea of the general issue is given in any action brought for any thing done under it. At the time of passing the last mentioned act Mr. *Smith* was seised in fee of the manor of *Farlington*, and of the springs mentioned in the act, which in 1769, with the manor and all other messuages, &c. which had belonged to Mr. *Smith*, were conveyed to *P. Taylor* in fee; and the conveyance contained, amongst other general words, all *springs of water*, streams, ponds, pools, &c. &c. By indentures of lease and release, dated the 18th and 19th of *January* 1794, *J. Lewis* and others, (trustees under the will of *P. Taylor*, and by divers mesne conveyances seised of the manor of *Farlington*, and other premises formerly belonging to *T. Smith*, and so conveyed to *P. Taylor*, in trust for *C. W. Taylor* for life, with remainders over,) conveyed sundry lands, &c. in *Farlington* to *J. Butler*; excepting and reserving "all the water-works and aqueducts in or upon the said lands or premises thereby granted and released, heretofore begun by *T. Smith* under the act in

the 14 *Geo.* 2. with all drains, pipes, &c. gutters, and other matters and things to the said water-works and aqueducts belonging; and also excepting and reserving authority to enter upon the lands conveyed to complete the said water-works and aqueducts by erecting engines or reservoirs, or doing any other works upon the lands conveyed at any time thereafter; the [375] persons for the time being beneficially interested in the said water-works and aqueducts, &c. making reasonable allowance to *J. Butler,* his heirs, &c. for waste of land or other damage occasioned thereby: and also excepting all manorial rights and privileges over the premises thereby conveyed. By indenture of the 16th of *February* 1809, *C. W. Taylor,* and his said trustees, *T. Lewis,* &c. conveyed to *A. Walker,* &c. in fee, all the estate, right, title, interest, &c. and benefit whatsoever of them the said *T. Lewis,* &c. and *C. W. Taylor,* under the act of the 14 *Geo.* 2., and all the rights, privileges, powers and authorities whateoever, by the same act given to the said *T. Smith* and his heirs and assigns, so far as concerned the conveying water, and the several works thereby authorized to be made, together with the same act itself, and all the aqueducts, pipes, &c. matters and things erected or provided by virtue of the act. On the 10th of *October* 1809, after several intermediate assignments, the said act of parliament, aqueducts and premises comprized in the last mentioned deeds were assigned to *William Rayley* and others, their executors, &c. upon certain trusts therein mentioned. *Farlington* is situated seven miles from *Portsmouth,* and from the spot where the trespass was committed: and although Mr. *P. Taylor,* who died in 1777, was during his life-time employed upwards of seven years in endeavouring to complete the said works, and laid out a large sum of money thereon, he was not able to bring the water from thence to *Portsmouth:* and his son being at the time of his father's death, an infant of the age of seven years, no farther endeavours were made to do so until the year 1809, since which the present proprietors of the works, Messrs. [376] *Rayley, Chalklen,* and *Belloncle,* have erected a steam engine, made reservoirs, and laid a main of iron pipes from thence to *Portsmouth* and through the fortifications of the town at a very considerable expense. The defendant acted under their authority, and under the act of the 14 *Geo.* 2., and broke up the pavements to lay the pipes in the streets of the town of *Portsea,* for supplying the same with water, and laid such pipes accordingly. The question was whether the plaintiff was entitled to recover? if he were, the verdict was to stand: if not, a nonsuit was to be entered.

Gaselee for the plaintiff, contended, 1st, That the act of 14 *G.* 2.,

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empowering *Smith* to break up the pavements of the town of *Portsea* for the purpose of laying water-pipes, was repealed by the subsequent act of the 32 *Geo.* 3., vesting the entire property of the pavements in the trustees, represented by the plaintiff in this action. There needs not express words of repeal, but every new statute implying a negative repeals a former affirmative statute (*a*). [Lord *Ellenborough*, C. J. The rule is that leges priores posteriores *contrarios* abrogant: that is, if the two acts cannot stand together. But how does the latter imply a negative of the former of these acts?] The act for bringing the water from *Farlington* passsd in 1740, and no progress having been made in the work for above fifty years, when the last paving act passed, it is reasonable to presume, though a statute cannot strictly be repealed by non-user, that the legislature considered the adventure as abandoned, and
[377] therefore were induced to vest in a different body new property and powers which were inconsistent with the former act, and thereby meant impliedly to repeal it. The two acts cannot stand together, because the paving act vests the whole property in, and control of the pavement, in the commissioners, which is inconsistent with a right in other persons to displace it for any purpose from time to time. 2dly, He contended that the rights and powers conferred by the act of the 14 *Geo.* 2. on *T. Smith* were merely in virtue of his territorial character of *lord of the manor of Farlington*, to which character only the legislature thought they could safely confide those extraordinary powers, which could not therefore be severed from it: and if so, the defendant's justification fails.

D. Pollock, contrà, was stopped by the Court.

Lord ELLENBOROUGH, C. J. The case admits of no doubt upon either point. The powers under the several acts may well subsist together; they were severally conferred for different purposes. The pavement was vested in the commissioners for the general purpose of securing convenient highways and passages in the town. The power of breaking it up was vested in Mr. *Smith*, and his assigns, for the purpose of laying and repairing pipes for the supply of water to the inhabitants, making good the pavements again. And no person can doubt that if *Smith*'s assigns break up the pavement for the purposes for which they are authorized to do so, without replacing and repairing it again, they would be amenable for it either by indictment or by action for the injury done to the prejudice of

(*a*) By *Eyre*, J. in *Harcourt* v. *Fox*, 1 *Show.* 520. Vide *Ex parte Caruthers*, 9 *East*, 44.

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the commissioners. Then on the other point, the object of granting the powers was not * personal; but that the person who, as lord of the manor, then had the property in the springs, might lay pipes to bring the water to the town: it was to facilitate the supply of the water to the inhabitants; and therefore the defendant, who acted under those in whom all the property in the springs and the right to conduct them to the town are now vested, has the same powers under the act as were originally vested in *Smith*.

Per Curiam, Postea to the defendant.

HARRINGTON *against* TAYLOR.

Friday, April 24th.

A replication to a plea of the statute of limitations shewed a bill of *Middlesex* sued out by the plaintiff on the 8th of *August*, 1805, (being in the vacation) within six years after the cause of action accrued; to which the she-

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riff returned non est inventus, and then stated the alias and a succession of pluries bills down to *Easter* term 1811, to each of which but the last it was averred that the sheriff made no return, and that the defendant did not appear, but that he did appear to the last on the return-day, when the plaintiff offered himself against the defendant in the plea aforesaid, *as by the record and proceedings thereof, remaining in the said court, &c. at large appears*. Held, 1st, that this latter allegation had reference to all and every the prior process stated, and was therefore tantamount to an allegation of the sheriff's return of non est inventus to the first bill of *Middlesex* stated, with a *prout patet, &c.*; against which there could no averment in pleading. 2dly, That the Court will take notice in pleading of the issuing of the bill of *Middlesex* on a day in vacation, though it be not pleaded to have been then issued *as of the preceding term*.

THE plaintiff declared in assumpsit upon a special agreement made between him and the defendant on the 30th of *January* 1801, for the breach of which he complained; the memorandum of the plea roll being of *Easter* term, 51 *G.* 3. The defendant pleaded non assumpsit, and the statute of limitations. The plaintiff replied to the last plea, that within six years after the cause of action accrued, to wit, *on the 8th of* August 1805, he, for the recovery of his damages, &c. sued out of the court of *K. B.* a certain precept called a bill of *Middlesex* against the defendant, returnable on *Thursday* next after 15 days of *St. Martin* 1805; to which the sheriff returned *non est inventus*. That the plaintiff then sued out an alias bill of *Middlesex* against the defendant, returnable in *K. B.* on *Thursday* next after eight days of *St. Hilary* 1806; to which the sheriff made no return, and the defendant did not appear. In like manner the replication set forth pluries bills of *Middlesex* against the defendant, returnable on the first return-days of the succeeding terms down to *Easter* term 1811; to each of which the sheriff made no return. But to the bill of *Middlesex* returnable on the first return-day of the last mentioned term, it stated the appearance of the defendant by his attorney on the return day in the court of *K. B.* at *Westminster*, according to the exigency of the last mentioned precept, and that the plaintiff then and there offered himself against the defendant in the plea aforesaid, *as by the record and proceedings thereof*

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remaining in the said court, &c. more fully and at large appears. And then the plaintiff averred that the said several precepts were respectively so sued and prosecuted by him against the defendant, as aforesaid, with intent to implead the defendant upon and for the said cause of action in the declaration mentioned, and to cause him to appear in the said court here, and upon his appearance to declare against him for the said cause of action in the said declaration mentioned. That according to his said intent the plaintiff afterwards, to wit, in *Easter* term 51 *Geo.* 3., exhibited his said bill, and declared thereon against the defendant as aforesaid, to wit, at *Westminster*, &c. And that the several causes of action in the declaration mentioned accrued to the plaintiff within six years next before the issuing of the first mentioned precept out of the court of *K. B.* in manner and form as he has above thereof complained against the defendant; and this the plaintiff is ready to verify: wherefore, &c.

Rejoinder.

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The defendant rejoined, that the said supposed bill of *Middlesex* first mentioned in the replication was not delivered to the sheriff before the return thereof, or to any sheriff of *Middlesex* until long after the expiration of a year next after *Michaelmas* term in the replication first mentioned, to wit, until the 26th of *January* 1811; nor did the sheriff of *Middlesex* return the said first-mentioned bill of *Middlesex* before the 1st of *January*, in the year (*a*), of our said Lord the King; nor was the said first-mentioned bill of *Middlesex* returned to the said court here, or filed, according to the course and practice of the said court, at any time before the said *day* of *January* 1811 aforesaid, in manner and form as in the replication alleged; and concluded to the country.

Special demurrer.

To this there was a demurrer, shewing specially, 1st, that the rejoinder does not traverse that the first-mentioned bill of *Middlesex* was sued and prosecuted out of the court of *K. B.* on the 8th of of *August* 1805, by the plaintiff, for the recovery of his damages, as averred in the replication: nor does it traverse that the said precept in the replication first mentioned was afterwards returned by the sheriff of *Middlesex* to the court of *K. B.*: nor that the said several other precepts were sued and prosecuted out of *K. B.* by the plaintiff, with the intent specified in the replication: nor that the defendant appeared in the said court according to the exigency of the precept in the replication last mentioned: nor that the plaintiff afterwards, in *Easter* term 1811, exhibited his bill against the defendant with the intent specified in the replication; nor that the

(*a*) The copy of the rejoinder which I saw was thus worded.

cause of action in the declaration mentioned accrued to the plaintiff within six years next before the issuing of the precept in the replication first mentioned. 2ndly, That the rejoinder alleges that* the first mentioned precept was not returned to the court, or filed therein, before the *said day* of *January* 1811; without alleging before what day of *January* in that year; and it is uncertain whether the allegation relates to the 1st or to the 26th of *January* in the rejoinder before mentioned: and that the defendant does not traverse that the cause of action in the declaration specified accrued to the plaintiff either within six years next before the said 1st or the said 26th of *January* 1811. 3dly, That the rejoinder denies the return of the first mentioned precept in the replication by the first mentioned sheriff of *Middlesex*, in manner and form as the plaintiff has alleged the same to appear, by reference to the proceedings and record thereof remaining in the said court of *K. B.*, which denial amounts to a rejoinder of nul tiel record, and ought to have been so pleaded; and that the issue relating thereto is an issue to be determined by the production and inspection of the said record in the court, and not triable by the country; and that the rejoinder ought not to have concluded to the country. 4thly, That the rejoinder is double, as it contains a traverse of a matter triable by the country, namely, the time of delivering the first mentioned precept to the sheriff of *Middlesex*, as averred in the replication; and of a matter triable by the production of the record in court, namely, the return of the first mentioned precept by the sheriff of *Middlesex*, as alleged in the replication. 5thly, That the rejoinder ought not to have concluded to the country, as no complete issue is joined between the parties upon any single and distinct matter of fact.

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Starkie, for the plaintiff, contended, first, that the rejoinder was bad, as traversing the sheriff's return, which cannot be impeached in pleading between the parties, he being the accredited officer of the court: but if his return be false, the remedy of the party injured is either by action against him, or by summary application to the Court to rectify the return. There can be no averment in pleading against the return of the sheriff, 19 *Vin. abr.* 210., tit. *Return* (Q). 5 *Com. Dig.* 417., tit. *Return* (G). *Andrews* v. *Lynton*, 1 *Salk.* 265. *Rex* v. *Pember*, *Cas. temp. Hardw.* 112. *Rex* v. *Elkins*, 4 *Burr.* 2129. and *Austen* v. *Fenton*, 1 *Taunt.* 23. The suing out the original process in time satisfies the statute of limitations, and the subsequent continuances are mere matter of form, and may be entered at any time, and the Court will not inquire when. *Palmet* v. *Price*, 2 *Salk.* 590., and *Shaw* v. *Maxwell*, 6 *Term Rep.* 450. And here the proceedings must be taken to be regular, by the averment in the replication, "as by the record and

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proceedings thereof, remaining in the said court, &c. more fully and at large appears." Secondly, he objected that the rejoinder was bad, as concluding to the country, and not with a verification: but no further notice was taken of this objection in the result.

Peake, contrà, argued, first, that the sheriff's return of non est inventus to the first bill of *Middlesex* did not appear by any record, such return not being stated with a prout patet per recordum: and therefore the defendant might well traverse it as a fact. And in answer to an observation by the Court, that there was a sweeping clause after the statement of the several processes, "as by the record and proceedings thereof remaining in the said court, &c., more fully and at large appears;" he said that it only applied to the last
[383] process stated, to which the defendant had appeared. But Lord *Ellenborough*, C. J., having signified his opinion that the whole proceedings were thus referred to by one summary reference, instead of a repetition of the prout patet, &c. after each proceeding; *Peake* abandoned the objection, that the sheriff's return to the first process did not appear by record; and if it did so appear, he admitted that the authorities cited shewed that no averment could be made in pleading against it. He then took another objection to the first process stated in the replication, that it issued at a time when it could not by law issue, namely, on the 8th of *August, in vacation*. For though process does in fact issue in the vacation, and the true day of its issuing may if necessary be shewn: yet it is always tested as of the preceding term, and should be so pleaded: and it makes no difference that this was by bill of *Middlesex* and not by writ. *Belk* v. *Broadbent*, 3 *Term Rep.* 184. [*Bayley*, J. Was it not decided in *Hart* v. *Weston* (*a*), that it might be shewn in pleading that the writ, though tested as of the preceding term, issued on a certain day in the vacation?] Still it should be averred that it issued on that day tested as *of the preceding term*. And in *Estwick* v. *Cooke* (*b*), the Court held it bad, because it was averred to have issued on a day in the vacation. The objection therefore resolves itself into this, that no proper test is stated, nor that the writ issued on the day mentioned, as of the preceding term.

Lord ELLENBOROUGH, C. J. I cannot understand the reason
[384] why, as the Court will take notice that process may be issued in the vacation, the allegation that it was so issued should not be good.

BAYLEY, J. In *Estwick* v. *Cooke*, the allegation was that it issued on a day in the vacation, *the said Court then being held at* Westminster; which was incongruous.

Per Curiam, Judgment for the plaintiff.

(*a*) 5 *Burr.* 2586. (*b*) 2 *Ld. Raym.* 1757.

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NICHOLSON and Another *against* MOUNCEY and SYMES.

Friday, April 24th.

The captain of a sloop of war is not answerable for damage done by her running down another vessel; the mischief appearing to have been done during the watch of the lieutenant, who was upon deck, and had the actual direction and management of the steering and navigating of the sloop at the time, and when the captain was not upon deck, nor was called by his duty to be there.

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THE plaintiffs declared, in an action on the case, that at the time of committing the grievance complained of they were lawfully possessed of the ship *Doris*, then sailing on the high seas, on a certain voyage; and that the defendants had the care, command, conduct, government, management, and direction of another ship called the *Bonne Citoyenne*, then also sailing on the high seas; and that it was the duty of the defendants to conduct, manage, and navigate the last mentioned ship carefully and properly. Yet that the defendants, not regarding their duty in that behalf, managed conducted and navigated the last mentioned ship, and permitted and suffered the same to be managed and navigated, so incautiously, negligently, and improperly, that the last mentioned ship, so being under the care command, conduct, government, management and direction of the defendants, then and there, by reason of the negligent, careless and improper navigating and management thereof, and by and through mere negligence, bad management and want of care, then and there with great force and violence ran foul of and struck the plaintiffs' said ship, by reason whereof it was sunk and wholly lost. The defendant pleaded not guilty.

At the trial before Lord *Ellenborough*, C. J. at *Guildhall*, after *Hilary* term 1811, it was stated that at the time of the mischief complained of in the declaration the plaintiffs were the owners of the *Doris*, and that the defendant *Mouncey* was captain, and the defendant *Symes* first lieutenant of the ship *Bonne Cytoyenne*, being a sloop of war belonging to his Majesty. The cause came on be tried before Lord *Ellenborough*, C. J. at the sittings at *Guildhall* after *Hilary* term 1811, when, by consent of both parties, all matters in difference in the course between the parties were referred to Mr. *Gaselee*, of the bar, by an order of nisi prius, which was made a rule of Court: and a verdict was to be entered as he should direct. The arbitrator afterwards duly made his award, and thereby directed a verdict to be entered for the plaintiffs with 4500l. damages and 40*s*. costs. And for the purpose of giving the defendant Captain *Mouncey* an opportunity of taking the opinion of the Court upon a question of law, the arbitrator inserted specially in his award, that one of the questions made before him on the reference was whether, in the event of the plaintiffs being entitled to a verdict, it should be entered against Captain *Mouncey*; he not having the appointment of the officers of the sloop; but they, as

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well as himself, being appointed by the Lords Commissioners of the Admiralty: which appearing to the arbitrator to be a question of great public importance, and not yet to have been decided; he directed, as the best mode of putting it in a course of investigation, that the verdict should be entered against both the defendants: and

[386] for the purpose of enabling Captain *Mouncey*, if he should be so advised, to make an application to the Court to set aside so much of the award as directed the verdict to be entered against him, and to order a verdict to be entered for him, the arbitrator stated specially that at the time the mischief happened Lieut. *Symes* was the commanding officer of the watch, and was upon the deck, and in the actual direction of the management in the steering and navigating of the sloop. That Capt. *Mouncey* was not upon the deck, nor was he called upon by his duty to be so: and that unless from his situation as captain of the sloop, he was to be held responsible, although no negligence was personally imputable to him, he was entitled to have the verdict entered for him.

On the application of the defendant Captain *Mouncey*, the Court afterwards granted a rule, calling upon the plaintiffs to shew cause why so much of the award as directed a verdict to be entered against him should not be set aside, and instead thereof a verdict entered for him. And upon shewing cause in last *Easter* term, Lord *Ellenborough* C. J. said that it was a question of such very extreme consequence, that he should wish to have the facts put into the more deliberate form of a special case, and set down in the paper for argument; and that in the mean time every inquiry should be made as to the cases which had occurred upon the subject. This was accordingly ordered by the Court: and it was agreed that if the plaintiffs were entitled to recover, the original rule was to be discharged: if not, it was to be made absolute. The case stood over till this term, when

Abbott argued for the plaintiffs, that the captain of a ship of war is in the same situation as the captain of a merchant ship, who is

[387] answerable in an action on the case, for the negligence or misconduct of his crew in the management of it, by which damage is occasioned to another. In support of this he referred to the case of the captain of the *Russell* man of war, against whom an action was brought for running down the *London East Indiaman:* which is shortly stated in the report of *Bowcher* v. *Noidstrom* (*a*), as having been mentioned by *Lawrence*, J., from whence it appears that the captain was sleeping in his cabin at the time, and that the lieu-

(*a*) 1 *Taunt.* 569.

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tenant of the watch had the command of the ship: and that notwithstanding it was urged that the captain was not liable for the misfortune, inasmuch as the lieutenant, who was put in by the Admiralty, was not his servant, yet he was held liable. Upon inquiry made since, it appeared, he said, that the name of the case was *Webb and Others* v. *Drake:* and it was tried on the 1st of *June* 1779, at *Guildhall,* before *Buller,* J. and a special jury: and it was to be collected from the defendant's brief, which he then had, that whatever opinion the learned Judge might have delivered upon the question of law, as to the captain's liability in such a case, for the damage happening through the immediate agency of a subordinate officer on board; yet that the cause was heard throughout upon the merits, upon which the defendant finally obtained a verdict; the jury being ultimately of opinion that the fault lay with the *East Indiaman,* and not with the man of war. [*Le Blanc,* J. asked whether it appeared in that case that the captain was on deck at the time of the injury sustained, or whether it was his watch?] And after some communication between the respective counsel in this cause, it seemed to be agreed that Captain *Drake* had given the [388] orders on deck for the particular tack to be made, in the course of which the *Indiaman* was afterwards run down; but that he had gone below before, and was there when the accident happened. [Lord *Ellenborough,* C. J. Is there any case in the law where one description of servant has been held liable for the default of another servant under the same master?] Though the captain of a man of war has not the appointment of his sub-officers, yet he has a complete control over them, and may suspend them for any neglect or misconduct. But neither does the captain of an *Indiaman* appoint his officers; for they are appointed by the owners. [Lord *Ellenborough,* C. J. then asked if there were any case where the captain of an *Indiaman* or other merchant vessel had been held answerable for the misconduct of another officer on board the ship not appointed by himself; he not being present or cognizant of the injurious act at the time?] It might be difficult to maintain an action of trespass in such a case; but it has always been considered that case would lie. [*Grose,* J. This action is for the negligence of the captain; how then can we say that it will lie when that negligence is negatived by the fact found?] It is merely his *personal* negligence which is negatived, not his implied negligence in law, from the actual negligence of another, for whom he is responsible. [*Grose,* J. A master is answerable for the negligence of his servant in his employ; but how was the lieutenant the servant of Captain *Mouncey?*] That resolves itself into the general question, upon

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which he admitted that he had no adjudged case to produce; but rested the argument on the analogy of this to the case of masters of merchant vessels; who have been held liable * for the misconduct of their crews on similar occasions.

[*389] *Peake*, contrà, denied that there was any analogous case in the law, to make the captain of a ship of war liable in damages for the misconduct or negligence of the numerous persons under his command, whom he does not appoint; and insisted upon the injustice of applying such a rule to officers so situated, and the serious consequences to the public service. The principle upon which masters are liable for the acts of servants or workmen in their employ (*a*) is, that their servants are appointed by them, and they must take care to employ persons of competent skill and due diligence in the business to be done by them: and though this has been extended to servants appointed by a steward or agent (*b*), who was entrusted with the power of appointing and dismissing such servants; yet that was upon the same principle, because the appointment was made as the agent or servant of the master. In the great case of *Lane* v. *Cotton* (*c*), all the Judges agreed upon the general principle, though they differed in the application of it to the postmasters, whom three of the Judges, against Lord *Holt*, held not to be liable for Exchequer bills lost by the default of a clerk in the office. *Gould*, J. said it was an office "founded in government, in which each had a distinct branch to exercise; yet with subordination and [390] dependency on the chief master; but *not as servants*, but by the very constitution and erection of the office," &c.: and he compared it to "a corporation, in which the head is over the rest, yet not answerable for the miscarriage of any inferior member." In another report (*d*) *Powys*, J. says: "the defendants have not the power of the management of the office according to their discretion, but are subject to the control of the King and of the Treasury. And because the inferior officers are servants of the King, and not of the defendants; their wages being paid to them out of the revenue of the post-office, &c.; therefore it is unreasonable that the defendants should be answerable for the acts of the inferior officers." The only ground of Lord *Holt's* difference from the other Judges was that he considered the clerks to be the servants of

(*a*) The case of *Bush* v. *Steinman*, 1 *Bos. & Pull.* 404., which collects the antecedent cases, was particularly referred to: and see *M'Manus* v. *Crickett*, 1 *East*, 106., and *Fletcher* v. *Braddick*, 2 *New Rep.* 182.

(*b*) *Stone* v. *Cartwright*, 6 *Term Rep.* 411.

(*c*) 12 *Mod.* 472. 477. S. C. 5 *Mod.* 455. *Carth.* 487. *Salk.* 17.

(*d*) *Ld. Ray.* 650. S. C.

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the postmasters. "The reason," he said (*a*), "why a principal shall answer for his deputy is because as he, as principal, has power to put him in, so he has power to put him out, without shewing any cause." This reason clearly does not apply to Captain *Mouncey*, who had neither power to put in, nor to put out, his first lieutenant. In general merchant ships the captains have a power of hiring their sailors; and so far they may be considered as independent of their owners; which may differ their case from the present: and the very reason given in *Molloy* (*b*), why the master shall be responsible for the act of the mariners is that they are of his own choosing, and he may reimburse himself any injury they may have committed out of their wages. Then considering the captain in relation to his officers and crew, not in the character of a master to his servants, but as an agent of the government superintending or dealing with others on account of the public, there are many authorities to shew that he would not be liable; such are *Macbeath* v. *Haldimand* (*c*), and *Unwin* v. *Wolseley* (*d*). In the case of the *Russell* man of war, it does not appear how the point could well have arisen: for the captain, before he went below, had given express orders to the lieutenant to put the vessel upon the tack she was on at the time of the accident; and therefore, if that were wrong, he was the person responsible for it; but the jury thought that the fault lay with the *Indiaman*.

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Abbott, in reply, observed that there was a great difference between cases of tort, like this, and cases of contracts by avowed agents on behalf of another, where the remedy was clearly against the principals; but in cases of torts, the party grieved may sue either. The case of the postmasters is also different; for they have not the same immediate and personal control over and direction of the acts of their subordinate officers, who are dispersed all over the kingdom, as the captain of a ship of war has over his officers and crew.

Lord ELLENBOROUGH, C. J. This is a case very important in its consequences, and if I thought it as doubtful in principle as it is important, I should wish for further consideration before I delivered my opinion: but I cannot entertain any doubt upon it. Captain *Mouncey* is said to be liable for the damages awarded in this case, by considering him in the ordinary character of master of the vessel, by means of which the injury was done to the plaintiffs' property. But how was he master? He had no power

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(*a*) 12 *Mod.* 489. (*b*) *B.* 2. *c.* 3. *s.* 13. (*c*) 1 *Term Rep.* 172. (*d*) *Ib.* 674.

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of appointing the officers or crew on board: he had no power to appoint even himself to the station which he filled on board: he was no volunteer in that particular station, merely by having entered originally into the naval service; but was compellable to take it when appointed to it, and had no choice whether or not he would serve with the other persons on board, but was obliged to take such as he found there and make the best of them: he had no power either of appointment or dismissal over them. The case therefore is not at all like that of an owner or master, who, according to the principle laid down by Lord C. J. *Eyre* in *Bush* v. *Steinman*, is answerable for those whom he employs, for injuries done by them to others within the scope of their employment. The principle perhaps cannot be impugned, though that was a hard application of it. It does not however apply to this case. Here Captain *Mouncey* was a servant of his Majesty stationed on board this ship to do his duty there, together with others equally appointed and stationed there by the same authority to do their several duties. They had each their several duties to perform, only they were to be performed on board the same ship. In the case of *Lane* v. *Cotton*, now established as law, Lord *Holt* only differed from the other Judges upon the point, whether in truth the clerk in the post-office, to whom the misconduct was in fact attributable, was the servant of the postmasters or not: the facts of that case were indeed very different from the present: but even with the power of appointment of such clerks, the postmasters were held not to be liable for their default. Then with respect to
[393] the case of *Webb and Others* v. *Drake*, which at first was supposed to have been an authority in support of this action; if, as it is now stated, the captain had originally given the order to proceed in the course the ship was holding when the damage was done, there might have been some colour (I do not mean to say that there was any) for making him liable as for his personal act. But here there was no personal interference of the captain with the act of the lieutenant, by which the damage was occasioned: both indeed were servants of one common master, but there was no consent by the one to the act of the other, unless that can be inferred from the community of their services. This disposes of the rule as it affects the case of Captain *Mouncey;* and it does not touch the case of the other defendant.

GROSE, J. This action, as it affects the defendant Captain *Mouncey*, is founded on his alleged negligence; but the facts stated shew negligence, not in him, or in any servant or agent of his, or in any person whom he has appointed, but in some other

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person: it is an attempt therefore to place upon his shoulders a burthen which ought to be borne by another. There can be no reason for making one man liable for the act of another whom he did not appoint or employ. If Captain *Mouncey* had ordered the other to do the act, it would have been a different question.

LE BLANC and BAYLY, Justices, concurring,

Rule absolute.

DEN, Lessee of ELIZABETH FRANKLIN, *against* TROUT.

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Friday, April 24th.

ON the trial of this ejectment, before *Le Blanc*, J., at *York*, a verdict was taken for the plaintiff, subject to the opinion of the Court on the following case.

Rebecca Stott, being seised in fee of a house in *Walmgate*, in the city of *York*, to recover possession of which this action was brought, by her will, dated 23d of *March* 1773, duly executed and attested, devised as follows: "I give, devise, and bequeath "unto *Elizabeth Franklin* all my *estate and effects* whatsoever and "wheresoever, which I shall be possessed of or entitled to at the "time of my decease, and all such sums of money which may "then be due or hereafter to become due from any person, upon "bond or any other security whatsoever, and all interest then "due or to grow due for the same; *upon trust* that she shall, in "the first place, pay and discharge my funeral expenses, and all "my just debts. And I also subject *my said effects* which are be-"queathed to the said *E. Franklin*, to the following *legacies;* that "is to say, I give and bequeath unto my brother *Nicholas Stott*, "and to his daughter *Rebecca* 10*l.* to be divided equally between "them yearly, during their joint natural lives, and to the sur-"vivor for life. I give to *Richard Stott*, my nephew, eldest son "of the above-named *N. Stott*, 1*l.* 1*s.* I give to my nephew "*Wm. Stott*, another son of the said *N. Stott*, *the house his father* "*now dwells in*, situate in *Walmgate*, in the city of *York*, *at the* "*decease of his said father.* I also give to the said *Wm. Stott* 50*l.* "I give to my nephew *Wm. Stott*, eldest son of my late brother "*George Stott*, deceased, 5*l.* I give to my nephew *Wm. Bullmer*, "son of my late brother-in-law *Peter Bullmer*, deceased, 50*l.* I "give to my cousin *Mary Slater*, 50*l.* And I give to *Robert Bar-*

Under a devise to *E. F.* of "all my *estate and effects* whatsoever and wheresoever," in trust to pay funeral expenses and debts; and then "subjecting my said *effects* bequeathed to *E. F.* to the following *legacies*," enumerating amongst these a gift to *W. S.* of "*the house his father now dwells in at the decease of his said father*;" and giving to the father an annuity, and to the son a sum of money, and giving other pecuniary legacies; and then, after desiring all the above legacies to be "paid out of my *effects* by

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the said *E. F.*" giving "all the *rest and remainder* of my *said effects* to the said *E. F.*, her *heirs and assigns for ever*:" held that *E. F.* took the remainder in fee in the house (which was the only real property possessed by the testatrix) after an estate for life by implication in the father, and a remainder for life only to the son; though the personal estate was sufficient to pay all the personal charges.

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"*ker*, jun. 30*l*. My will is, and I desire that all the above lega- "cies shall be paid out of my *effects* by the said *E. Franklin* in "twelve months after my decease; and that after payment there- "of, my funeral charges, and just debts, as aforesaid, I give and "bequeath *all the residue and remainder of my said effects* unto the "said *E. Franklin*, her heirs and assigns for ever; any thing "hereinbefore contained to the contrary notwithstanding: and, "lastly, I do appoint the said *E. Franklin* sole executrix of this "my last will." The testatrix died in *December* 1777, possessed of more than sufficient personal property to pay her debts, legacies, and funeral expenses. *Nicholas Stott*, one of the legatees, was the heir at law of the testatrix, at the time of the date and execution of her said will, and at the time of her death, and is now deceased. *Rd. Stott*, another legatee, was the eldest son and heir at law of *Nicholas Stott*, and is also deceased. *W. Stott*, another son of *N. Stott*, was heir at law of *Richard Stott*, and died on the 2d of *Nov.* 1809. The defendant is tenant in possession and devisee of the house in question under the will of *Wm. Stott*, the heir at law of the testatrix. The question reserved was whether *Eliz. Franklin*, the lessor of the plaintiff, did upon the death of *W. Stott* and *N. Stott* become entitled, as devisee in fee under the will of *Rebecca Stott*, to the house in question? If the Court should be of that opinion, the verdict was to stand: if not, a nonsuit was to be entered.

[396] *G. Eden*, for the lessor of the plaintiff, contended that she was entitled to the house, as devisee in fee. In *Andrews* v. *Southouse* (*a*) a devise of real estate to *A.* for life, and after his decease to *B.*, charged with an annuity for life to *C.*, was held to give *B.* a remainder in fee. Then the only question is whether the word *effects*, as here used, will carry the realty as well as personalty? That it will do so, if the intent be apparent, has been settled in *Doe* v. *White* (*b*), and *Doe* v. *Lainchbury* (*c*). And in this case the same intent is apparent from the whole context: for though the testatrix begins with devising all her *estate* and *effects* in trust; yet she afterwards drops the word *estate*, and speaks of the whole of what she had devised to *Elizabeth Franklin* under the words "*my said effects*;" subjecting them to certain *legacies*; among which *said effects* she describes her house in *Walmgate, York*, which she devised to her nephew *W. S.* at the decease of his father, but without any words of limitation: and then she gives "all the residue and remainder of her *said effects* to *Elizabeth Franklin*, her

(*a*) 5 *Term Rep.* 292. (*b*) 1 *East*, 33. (*c*) 11 *East*, 290.

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heirs and assigns for ever;" which latter words plainly shew her intention to pass the fee in the realty.

Walton, contrà, agreed that if there were a manifest intention to pass the realty by the word *effects*, it would so pass; but denied that such an intent was necessarily to be collected from this will. Even the word *estate* is equivocal, if coupled with any other expression denoting personalty in its ordinary signification; as here the word *effects:* and though the use of the words *estate* with *effects* may shew an original intention to dispose of her realty as well as personalty; yet in fact the testatrix has only proceeded to dispose of the latter, under the word *effects*. She first speaks [397] of her *estate* and *effects* of which she was *possessed*, (not *seised*,) then she subjects her *said effects*, (the word *effects* having been before used as well as *estate*,) which she had *bequeathed*, (a term usually applied to the gift of personalty,) to certain pecuniary *legacies*. It is true that amongst these, she gives the house in question, which was the only real property she possessed, to her nephew *Wm. Stott*, the son of the person whom she describes as then dwelling in it, *at the decease of his father*. Then she also gives to the same *W. Stott*, 50*l*. She had before given the father and his daughter and to the survivor 10*l*. a-year. And all the above *legacies* are directed to be paid by *Elizabeth Franklin* out of her *effects*. If then the house is to be included in that term, it will stand charged with the payment of an annuity to the very person to whom it is supposed to be immediately devised. This shews that she only meant to give her personal estate to *Elizabeth Franklin*, charged with all the pecuniary legacies; and it is found that the personalty is sufficient to satisfy all those charges. It is probable that the testatrix thought that she had disposed of all her interest in the house to *Wm. Stott* in remainder after his father's death: but though the fee would not pass by that devise, yet if it were not meant to be included in the residue of her *effects*, it would descend to him as heir at law; and the defendant, as his devisee, would still be entitled to the house.

Lord ELLENBOROUGH, C. J. The intention of the testatrix is so clear, and expressed by such competent words, that it cannot admit of any doubt. She begins with giving to *Elizabeth Franklin* "all her *estate and effects* whatsoever and wheresoever:" *whatsoever* is of what kind soever; and *wheresoever*, referring to place, more naturally points to real property: these words then are large enough [398] to carry real property, unless restrained by the subsequent words. She gives all her estate and effects, &c. which she is *possessed of* or *entitled to* upon trust. She subjects "all her *said effects*" be-

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queathed to *E. F.* to the following *legacies*. All then which is afterwards mentioned she considered as sufficiently described under the word *legacies;* amongst which is the devise of the house in question to *Nicholas Stott* the father, for life, and *at his decease* to *William* the son, for life: for saying that the son should have the house which his father then dwelt in, at the decease of the father, is an implied devise of it to the father; though that is not material to be considered, both being now dead. By this I get at the explanation of her meaning of the words *effects* and *legacies*, as including realty. She only gives the father and son, however, estates for life in the realty. Then having given to *Elizabeth Franklin* all her estate and effects, &c. which she was possessed of or entitled to, subject to certain legacies, by words competent to pass the fee in the realty, and shewing that she considered the devise of a house for life as a *legacy;* and having only taken out of the realty the estates for life to the father and son; she gives "all the residue and remainder of her *said effects* to *Elizabeth Franklin, her heirs and assigns for ever:*" these latter words also look to the realty, and pass the fee. The cases cited of *Doe* v. *White*, and *Doe* v. *Lainchbury*, are confirmatory to shew that the word *effects* is capable of embracing the realty, if such appear to have been the meaning of a testator.

GROSE, J. The intention of the testatrix to pass the remainder
[399] in fee in the house to *Elizabeth Franklin* is perfectly clear: the last devise makes it so. Conceiving that she had parted with her real and personal estate by the word *effects*, subject only to certain pecuniary legacies, and to life-estates in the realty, she gives all the residue and remainder of her *said effects* to *E. F.* and her *heirs and assigns for ever*. That is decisive to shew that she meant her to take the fee in the realty.

LE BLANC, J. There is no doubt that the word *effects* is sufficient to pass real estate, if it appear to have been used by the testatrix in that sense: and the only question is whether by the residuary clause, giving all the residue and remainder of her said effects to *E. F.*, her heirs and assigns for ever, she meant to give all her real as well as personal effects which she had not before disposed of. We must collect her intention as to what all the residue embraced from the disposition before made by her as to the particular parts. She begins, by giving all her *estate* and *effects* whatsoever and wheresoever to *Elizabeth Franklin* in trust, in the first place, to pay her debts and funeral expences. Then dropping the word *estate*, she subjects her *said effects* bequeathed to *E. F.*, to the *legacies* which follow; amongst which is contained a disposition of the house in question: in this she gives by implication an

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estate for life to the father; and then she gives it to the son, without words of limitation; by which the son also took an estate for life only; and then she gives all the rest of her said effects to *E. F.* and her heirs for ever. The question is whether she did not thereby mean to give her every thing in the realty which she had not before disposed of? I suspect indeed that she thought she had given all her interest in the house to the son, by giving it to him in general terms after the death of his father; but she uses no words of limitation, and therefore he only took for life. But it is clear that she meant to give by the residuary clause every thing that she had not before given; and however we may suspect that she thought she had given the fee in the house to the son, yet we cannot give him that which she has omitted to give him.

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BAYLEY, J. concurred.

Postea to the Plaintiff.

WHITEHEAD and Others *against* TUCKETT (*a*).

Tuesday, April 21st.

IN trover for 37 hogsheads of sugar, which was tried before *Le Blanc*, J., at *Lancaster*, a verdict was found for the plaintiffs for 3000*l.*, subject to the opinion of the Court on the following case.

The defendant, a wholesale grocer at *Bristol*, employed *Sill* and Co., brokers at *Liverpool*, to buy and sell on his account great quantities of sugars. The greater part were bought on speculation for resale, and were resold at *Liverpool*, but some were occasionally sent to the defendant. *Sill* and Co. usually bought and paid for the sugars in their own names, and in like manner resold and received the purchase-monies in their own names. They did not draw upon the defendant for the particular amount of each purchase, nor remit to him the particular bill received in payment of each sale; but there was a general running account between them. *Sill* and Co. never had a general authority to buy for the defendant, but in each instance received his direction for so doing; but when the markets were low, they had sometimes an unlimited authority as to quantity

Brokers in the usual habit of buying and paying for, and of selling and receiving the value for sugars, on speculation, in their own names, and upon their own judgment, for their principal; sometimes when the mar-

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ket was low, under an unlimited authority as to quantity and price; at other times under special instructions to buy; but guided from time to time by special

instructions to sell, and limited in respect of price, and advised from time to time by their principal as to the probable rise or fall of the market; but keeping only a general account with their principal of the sums advanced to and received for him, without accounting separately for each particular lot purchased and resold; may bind him by a resale of a particular parcel of sugars before purchased and paid for in their own names, and lodged in their own warehouse, though sold under the price directed by their principal, for whom they received the money, but afterwards failed. The general authority of the brokers to sell, so as to bind their principal in respect of the purchaser, being to be collected from their general dealing, and not merely from their private instructions as to the particular parcel of goods.

(*a*) I was favoured with this note by Mr. *Maule*.

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or price. Previously to the transaction which gave rise to the present action, *Sill* and Co. had not a general authority to sell at their discretion, but received the defendant's directions to sell on each occasion, and were limited as to price; and upon the transaction in question they had no authority in general, than what appears from the letters hereinafter stated. In *May* 1810, *Sill* and Co. bought in their own names 50 hogsheads of *St. Croix* sugar of *Ewart, Rutson,* and Co., on account of the defendant, paid for them by their own draft, and reimbursed themselves by drafts on the defendant; not for the particular amount of this purchase, but on the general account running between them. The samples were sent as usual to *Sill* and Co.'s office, and remained there till the sale to the plaintiffs hereafter mentioned, and the sugars were removed from the warehouse of the sellers to the warehouse of *Sill* and Co.

The following are extracts from the correspondence between *Sill* and Co., and the defendant. *Sill* to *Tuckett,* 7th *July* 1810. "We attend to your instructions of selling 1 *a* 200 hogsheads of your sugar as soon as we can get 4*s.* to 5*s.* per cwt. on them, and having
[402] an order from *C. E. Rawlins,* of your place, we have sold him forty hogsheads and two barrels, *St. Lucia* sugar, belonging to you, at 73*s.*, payable by his acceptance at four months, which, trust will meet with your approbation." *Tucket* to *Sill* and Co., 9th *August* 1810. "We are in no hurry to part with the sugars under your care, but whenever your market should advance 3*s.* above the present price, you may sell the whole of the *St. Croix* sugars *(a)*, bought in *May* last, at 68*s.* or 69*s.*; on the best terms to safe men." *Sill* and Co. to *Tuckett,* 11th *August* 1810. "We shall not offer any more of yours for the present, unless the prices advance further." *Tuckett* to *Sill* and Co., 11th *August* 1810. "By our *B. Sykes*'s letter, to-day, we see he is arrived at *Liverpool,* and that you have disposed of five of our lots of sugar at 4*s.* profit, which we are sorry for, as our late intention was to hold every cask until the prices got much higher, which we are very confident will be the case within six weeks. N.B. Of course you will not offer any more for sale till further instructions from *Bristol.*" *Tucket* to *Sill* and Co., 27th *August* 1810. "Our raw sugar market, though not brisk, continues to keep up, gives some prices, and we are very confident the price will continue to advance; when you can obtain 10*s.* per cwt. on cost, we may be inclined to sell a few of our sugars, Though we are poor, we are willing to suspend a little while longer,

(*a*) The sugars in question were part of the *St. Croix* sugars here mentioned.

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being very confident far better prices will be obtained by and by." *Tuckett* to *Sill* and Co. 22d *September* 1810. "Sugars we are not inclined to sell at present, from an undoubted opinion that they will soon rally again." *Tuckett* to *Sill** and Co., 22d *October* 1810. "Our sugar market is brisk and advancing. Could there be any possibility of selling the *St. Domingo* coffee at anything like cost price? Should the sugar market advance about 2*s.* higher, you may sell any of our sugars, when cost price and expenses can be obtained, to men of undoubted safety. We see by your letter that raw sugars are much sought after; and if you can get 1*s.* for these these three lots of *St. Croix*, bought in the 5th month, at 69*s.* 6*d.* you may let them go. The 38 hogsheads of AB. L. that you value at 71s. would bring here 74*s.* or 75*s.*, we attend your reply." [*403]

On the 15th of *October* 1810 *Sill* and Co. sold the 50 hogsheads of *St. Croix* sugar to the plaintiffs, at 69*s.* per cwt.: and an invoice was made out and delivered by *Sill* and Co. to the plaintiffs, headed as follows: "*Liverpool*, 10th month, 15th, 1810. *Whitehead, Whittle* and *Herd*, bought of *James Sill* and Co. 50 hogsheads of sugar, payment in three months and twelve days, equal to four months cash." Then follows a statement of the numbers and weights, amounting to 634*c.* 2*q.* 3*lb.* nett, at 69*s.* 2189*l.* 2*s.* 4*d.* The plaintiffs duly paid *Sill* and Co. for these sugars, according to the contract; and afterwards, on their application, 13 hogsheads were delivered by *Sill* and Co. to the plaintiffs, and by them removed; namely, 3 hogsheads on the 20th, and 10 on the 25th of *October* 1810. *Sill* and Co. did not inform the defendant of the sale of these sugars to the plaintiffs, nor of the delivery of those last-mentioned, nor did they remit to him the purchase-money by them received from the plaintiffs. The remaining 37 hogsheads continued in the warehouse of *Sill* and Co. until their bankruptcy, [404] when they were taken possession of by the defendant; and upon his refusal to deliver them to the plaintiffs, this action was brought. If the plaintiffs are entitled to recover, the amount of the damages was agreed to be settled by arbitration at *Liverpool*. The question for the opinion of the Court was whether the plaintiffs were entitled to recover? if they were, the verdict was to stand, or be entered for such sum as should be awarded: if not, a nonsuit was to be entered.

Richardson, for the plaintiffs. The question turns on the validity of the sale made by *Sill* and Co. to bind the defendant, which question does not depend upon any nice or critical construction of the letters stated in the case; upon which it will be objected that, as between *Sill* and Co. and the defendant, the former had no compe-

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tent authority to sell the particular sugars; but it will be sufficient to bind the principal, if the agents had a general authority to sell for him. [*Le Blanc*, J. The only question will be whether *Sill* and Co. had authority to sell at the particular time: for there is no doubt that the sugars were left in their hands generally, for the purpose of sale; though they might have been directed to hold their hands at the particular time.] The public could not be aware of any restrictions as to time imposed by the letters which had passed between them, nor what were the views of either party, touching the probability of getting a better market by delay; but *Sill* and Co. were generally known as brokers engaged in the sale and purchase of sugars in their own names, and in that character
[405] the defendant permitted them to have the custody of the sugars at their warehouse to dispose of them, and receive the price in the usual way of their business, and there was a running account between them. This therefore was not the case of a broker pledging the goods of his principal, so as to fall within the exception estatablished by the case of *Paterson* v. *Tash* (*a*), which has been considered by the Court as an anomalous case. The cases of *George* v. *Clagget* (*b*), and *Rabone* v. *Williams* (*c*) shew that if a factor be permitted to act in his own name with the goods of his principal, the buyer will be entitled to look to him as the person with whom he deals, and to claim the benefit of a set-off against him. The same doctrine applies where one of several partners is permitted to sell the partnership goods, or a servant the goods of his master; notwithstanding they exceed their authority, yet in the one case the master, in the other the partners, are bound; because the sellers, being entrusted with a general authority, it cannot be expected that a bona fide purchaser should be aware of any restrictions which limit it; as is said in *Nickson* v. *Brohan* (*d*). In *Pickering* v. *Busk* (*e*) it was decided by the Court in the last term, that where a broker, whose business it was to buy and sell in his own name, was entrusted by his principal with the apparent control over his property, and sold it; the principal was concluded by such contract: which case is in point, and decisive of the present.

Scarlett, for the defendant contended that the argument for the
[406] plaintiffs assumed what the case did not warrant, viz. that *Sill* and Co. had a general authority to sell, which was restrained only by the letters; whereas the question intended to be raised was whether these letters conferred such a general authority as would bind the

(*a*) 2 *Stra.* 1178. (*b*) 7 *Term Rep.* 359. (*c*) *Ib.* 360, *in notis.*
(*d*) 10 *Mod.* 109. (*e*) 13 *East*, 38.

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defendant. The distinction between a general and a special authority is well known, and it may be admitted that where a person is entrusted with the former, he may bind his principal by his acts, though exceeding his particular authority: as if a servant who is employed generally by a horse-dealer to sell his horses, give a warranty with a horse; such warranty will bind a master, though the servant had no authority to give it. But a broker has not such a general authority, but has a special one only, in respect of each parcel of goods entrusted to him for sale: and then, according to *Fenn* v. *Harrison* (*a*), unless he pursue such special authority in the mode prescribed to him, he cannot bind the principal. In this case the authority of *Sill* and Co. was derived from the letters, the main object of which, so far from giving a general control over the sugars to *Sill* and Co., was to direct and limit their conduct as to the disposal of them: and the letter, (22d *Sept.* 1810,) which was that immediately preceding the sale, expressly states "that the defendant was not inclined to sell at present, from an undoubted opinion that sugars would soon rally:" so that there was an express prohibition to sell them on the part of the defendant. It will therefore be extending the liability of a principal further than it has been hitherto carried, to hold in this case, merely because the samples were left in the hands of the brokers, and the principal employed them upon other occasions before this, that the acts of the brokers, done in contravention of the restrictions imposed on them, should bind the defendant. He then mentioned a MS. case in 1792 or 3 to the following effect: A servant was sent with a horse to a fair, with an express order from the master not to sell it under a certain sum; the servant notwithstanding sold it for a less sum; upon which the master immediately gave notice and brought trover against the purchaser: and it was held that he might recover, because the servant was not his general agent.

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Richardson in reply. The letters shew that the sugars were left with *Sill* and Co., the brokers, for the purpose of sale, which is enough to give them a general authority; and it matters not what were the intentions of the defendant respecting the time of sale. In *Pickering* v. *Busk*, it did not appear that the principal had conferred any other power of sale than what arose from the circumstance of placing goods in the hands of a common agent for the purpose of sale; yet that was held sufficient to bind the principal. With respect to the MS. case cited, that decision may be admitted, without prejudice to the plaintiffs; because there the servant was

(*a*) 3 *Term Rep.* 757.

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not a person generally employed by his master in the sale of horses.

Lord ELLENBOROUGH, C. J. This is an action brought by the plaintiffs to recover the value of certain hogsheads of sugar purchased by them of *Sill* and Co., who are brokers at *Liverpool*, which the defendant claims to retain as his property, as having been improperly disposed of by *Sill* and Co., to whom he had entrusted them for the purposes of sale under a limited authority, which
[408] they had exceeded. Much of the argument in this case has turned upon the question whether *Sill* and Co. were invested with a general authority to sell the sugars: when that question is discussed, it may be material to consider the distinction between a particular and a general authority; the latter of which does not import an unqualified authority, but that which is derived from a multitude of instances; whereas the former is confined to an individual instance. Such was the distinction which governed the decision in *Fenn* v. *Harrison*, and in the MS. case cited. Now in that sense of the term *general authority*, *Sill* and Co. were general agents; for they bought and sold in a multitude of instances in their own names, paid and received the money in their own names, and blended their accounts of receipts and payments, without carrying each order to a separate account with the defendant: and although there was a communication between them and the defendant as to the price and time of sale, yet the world was not privy to that communication, and had therefore no means of knowing that their general authority was controlled by the interposition of any check. But even looking to the letters, I find nothing in them to contravene a general power of sale. There are indeed particular allusions as to the price and time of sale, by way of advice and instruction; but I cannot find that they contain any general prohibition to sell, nor any absolute limitation of the terms on which they were to sell. In the letter of the 9th of *August*, the defendant writes to *Sill* and Co. "that they may sell the whole of the *St. Croix* sugars at 68*s.* or 69*s.* on the best terms, to safe men." If these expressions are to be construed into so many restrictions of the power of the
[409] brokers, it will follow that they were not only limited as to price, but also as to the terms of sale, which according to the latter were to be the best, and as to the purchasers who were to be safe men: and if in either of these respects the contract made by them should fail, their principal would have a right to reject it. But if this could be done, in what a perilous predicament would the world stand in respect of their dealings with persons who may have secret communications with their principal. Such communications there-

fore must not be taken as limitations of their power, however wise they may be as suggestions on the part of the principal. In another letter the defendant, alluding to information, which his house had received from *Sill* and Co., of their having disposed of some lots of sugars, remarks "that they are sorry, as their late intention was to hold every cask until the prices got much higher." Now this is the very language of a person who had given his broker an authority to exercise his discretion upon the subject, and not of one who might have repudiated the contract as being contrary to his instructions. The subsequent letter of the 27th of *August* to *Sill* and Co. states, "when you can obtain 10*s*. per cwt. on cost, we may be inclined to sell a few of our sugars," &c. This is a mere communication of speculation and advice from the principal to the brokers, which presumes a general authority in the brokers, with a desire, on the part of the principal, to direct them in the exercise of it. The case of *Paterson* v. *Tash* is not involved in the decision of this: when that case comes directly before us we shall take occasion to consider it apart. Looking then at this correspondence, (which might perhaps have been more properly left to the consideration of a jury,) we find that there was a sale of part of these sugars recognised in one instance by the defendant, and [410] that subsequently there was not any positive prohibition against future sale. Upon the whole therefore, I think it must be inferred that *Sill* and Co. had a general authority to sell, and that the sale made by them is valid.

GROSE, J. I have had considerable doubts on this question as the argument has gone on: I was inclined at first to think, from the letters stated in the case, and from finding the defendant constantly speaking in them of selling at certain prices, that *Sill* and Co. had not a general authority to sell: but upon consideration I think the discretion of the brokers was left very much at large in the business; and when that is the case, it would be very dangerous to hold third persons bound by communications passing behind their back between a principal and his broker. I think therefore, under these circumstances, that the principal was bound by the acts of the brokers.

LE BLANC, J. The plaintiffs are the vendees from *Sill* and Co. of certain hogsheads of sugars, for which they have paid the value; the defendant is the person who employed *Sill* and Co.; and the question is whether the Court can collect from the circumstances stated, that *Sill* and Co. had a general authority to sell? In order to determine that question, I think the Court is not to look to the correspondence as it relates to this particular parcel of sugars only,

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but as it is connected with all the circumstances of the case. It appears then that the goods were left with *Sill* and Co. for sale; and although they had not a general authority expressly given to them by the letters, yet that in many instances they bought and sold for the defendant in their own names, without making any specific appropriation to the separate account of the defendant either of the monies received in respect of such sales, or of the monies expended on such purchases. Thus they appeared acting as general agents for the defendant; and upon one occasion in particular, (already alluded to by my Lord,) when the defendant received intelligence of their having sold a lot at a lower price than he intended, instead of repudiating the bargain as contrary to his instructions, we find him indeed expressing his sorrow thereupon, but acquiescing in that which had been done. Can the Court then say, after these instances of general authority exercised over the goods of the principal, that in this particular instance the authority of *Sill* and Co. was controlled, so as to invalidate a sale made by them to a bonâ fide purchaser? I think it cannot, but that under the circumstances we must hold the defendant to be bound by the general authority thus given to *Sill* and Co. It is unnecessary to enter into the question whether an agent who exceeds his authority can bind his principal.

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BAYLEY, J. I think the only conclusion to be drawn from the facts stated is that *Sill* and Co. had a general authority to sell, and that it would be a fraud on the public to hold otherwise. *Sill* and Co. were common brokers for the sale of sugars; and if the defendant suffered them to buy and sell for him in their own names, and thereby to hold themselves out to the world as the owners of the goods, he must be taken to have given them a general authority. There was nothing to designate him as the owner; neither the bills of sale being in his name, nor the price of the goods sold or purchased carried to his separate account: so that in all respects *Sill* and Co. appeared as the owners. If therefore they have abused the confidence reposed in them, the defendant, who entrusted them, and not the plaintiffs, the innocent purchasers, must suffer for it. I agree, therefore, that the plaintiffs are entitled to recover.

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Per Curiam. Postea to the Plaintiffs.

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BATHE and Another *against* TAYLOR.

Monday, April 27th.

A bill drawn on the 1st of *August*, at two months, by *A.* on *B.*, payable to the order of the drawer, and accepted and re-delivered by *B.* as a security for a debt, and kept by *A.* for 20 days, cannot be altered in its legal effect by bringing forward the date to the 21st, without a new stamp; though by the consent of the acceptor, and before indorsement and delivery to a third person; the alteration not being made to correct a [413] mistake in the original form of the bill, which was drawn conformably to the original intention of the parties, and available in that form.

THIS was an action by the indorsee of a bill of exchange against the acceptor, in which the declaration stated that the bill was drawn by *E. Ledger* on the 21st *of* August 1811, of that date, directed to the defendant; requiring him, two months after date, to pay to the order of him *E. Leger*, 60*l.* 10*s.* value received; which the defendant on the same day excepted, and which bill *Ledger* afterwards endorsed to *Worley* and *Eyre*, who endorsed it to the plaintiffs; of all which the defendant had notice, and thereby became liable and promised to pay it, &c. There was a second count, alleging the indorsement of the bill by *Ledger* to the plaintiffs; and there were also the money counts. At the trial before Lord *Ellenborough*, C. J. in *London* the defence set up was that the date of the bill was altered after it had been accepted. For that purpose *Ledger*, the drawer, was called, who proved that he had drawn the bill on the 1st of *August*, which was the original date of it when it was accepted by the defendant, and returned to *Ledger*, in payment of a debt due to him from the defendant; that he, *Ledger*, kept the bill in his desk, till about three weeks afterwards, when he informed the defendant that he either had or would alter the bill to the 21st, by which it would fall due 20 days later; that he did accordingly alter the bill, and that the defendant thanked him for it, though he had not desired him to do so. *Ledger* further said that he had not dealt with the bill in any respect before the alteration; and that he afterwards indorsed it to *Worley* and *Eyre*, who indorsed it to the plaintiffs. It was thereupon objected that the plaintiff should be nonsuited: but the case of *Kershaw* v. *Cox* (*a*), having been cited to shew that an alteration bonâ fide with the consent of the original parties on the bill, would not vitiate it, or make a new stamp necessary; and it being contended that no new stamp was necessary in this case, as the alteration was made before it was put in circulation; his lordship permitted the plaintiffs to take a verdict, but reserved the point.

In the last term *Jervis* obtained a rule nisi for entering a nonsuit; distinguishing this from *Kershaw* v. *Cox*, because the alteration made was in conformity with the original intention of the parties, and to rectify a mere mistake in the form of drawing the note: and referring to *Master* v. *Miller* (*b*), *Bowman* v. *Nichol* (*c*), *Card-*

(*a*) 3 *Esp. N. P. Cas.* 246.
(*b*) 4 *Term Rep.* 320.
(*c*) 5 *Term Rep.* 537.

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well v. *Martin* (*a*), *Wilson* v. *Justice* (*b*), and *Knill* v. *Williams* (*c*); to shew that any material alteration of a bill after it is circulated makes it a new bill, and requires a new stamp: and here, he contended that the acceptance of the bill by the defendant, and the return of it to the drawer, was a circulation of it in its original form.

[414] *Garrow* and *Abbott* now shewed cause against the rule, and insisted principally that the bill could not be considered as having been put in circulation while it remained in the hands of the drawer; and that it was competent to him, with the consent of the acceptor, to alter it while it so remained with him, and before he had dealt with it. Till *Ledger*, to whose order it was made payable, had indorsed it, which was not till after the alteration, the bill was wholly inoperative against the acceptor; and while it continued in the drawer's hands it was of course inoperative against him; so that before the alteration, the bill had no legal effect against any person. If the mere using of the stamp were sufficient to raise the objection, then it would equally avail if the drawer, after having put the bill into the hands of his clerk or banker to present it for acceptance, had immediately and before the acceptance recalled it for the purpose of giving it a new date. [*Grose*, J. Can this be said to be the *same* bill which was originally accepted? that is my difficulty.] The stamp might as well be said to be used as soon as the drawee has begun to write his name; but could not the date be altered by consent before he had finished his signature? [*Bayley*, J. In that case the contract could not have been complete before the alteration.]

Jervis and *Selwyn*, in support of the rule, after referring at large to the cases before mentioned for the principle on which this objection was founded, said that the objection upon the stamp laws was the stronger since the act of the 31 *Geo.* 3. *c.* 25. *s.* 19., which prohibits the stamping of any paper after any bill or note, &c. shall be ingrossed or written thereon; and the act
[415] of the 48 *Geo.* 3. *c.* 149. *s.* 11, 12, 13., which prohibits even the acceptance, as well as the re-issue of any bill or note, unless it be first duly stamped. The alteration in question was not made for the purpose of correcting any mistake, and in affirmance of the original intention of the parties, as in *Kershaw* v. *Cox* (*d*), and *Cole* v. *Parkin* (*e*), but for the new purpose of giving the acceptor further time; and therefore it comes expressly within

(*a*) 9 *East*, 190. and 1 *Camp. N. P. Cas.* 79.
(*b*) *Bayley on Bills*, 24. *n. a.*
(*c*) 10 *East*, 431.
(*d*) 3 *Esp. N. P. Cas.* 246.
(*e*) 12 *East*, 471.

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the case of *Knill* v. *Williams* (*a*). The assent of the acceptor cannot make any difference in respect to the stamp (*b*).

Lord ELLENBOROUGH, C. J. When this case came before me at nisi prius, my doubt was not so much upon the direct meaning of the words of the stamp acts, as upon the cases which I then supposed had put a qualified construction upon them. If I had followed up my original impression, that after the instrument was once effected, and had issued in a perfect form from the drawer to the acceptor, by whom it had been returned with his acceptance to the drawer, it could not be altered, I should have done right; for then it was a bill of exchange; it was tranferable; and so it was even while it continued locked up in the desk of the drawer. But after it had been decided in *Kershaw* v. *Cox* that the drawer might, in furtherance of his original intention, and with the consent of all parties interested, insert new words (or order) in it after it had been circulated; and after it had been held in *Cole* v. *Parkin* that a misrecital of a certificate of registry in a bill of sale of a ship might, by like consent, be corrected, so as to give it an effect which it had not before; it occurred to me that the principle of those cases might be extended and applied to the case before me, while the bill yet remained in the hands of the drawer, for whose benefit the acceptance was given. And if it had been left to the jury to say whether the alteration was not made in pursuance of the original intention of the parties, and they had so found it, there might have been some question in it. But upon looking into the cases, I cannot say that after the drawer had thus kept the bill for 20 days in his possession, he had power to alter it without a new stamp; for he had in the mean time put it out of his own hands into the hands of another to get it accepted, and it was too long after keeping it 20 days to give it a new operation by altering the date.

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GROSE, J. There is no doubt that this was in its original formation a good bill; and it never was intended that the same stamp, after having been sent out with one bill, should be used for another bill. Can I say that the first was waste paper?

LE BLANC, J. This question does not turn upon the assent of parties to the alteration of the bill, but upon the construction of a revenue law, according to which there can be no alteration of a stamped instrument after it has been used for one purpose. The question then is whether the bill so altered was not a new secu-

(*a*) 10 *East*, 431. (*b*) *Hill* v. *Patten*, 8 *East*, 373.

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rity, a substitution of a new contract in the place of that which the parties originally made? The bill drawn by *Ledger* was accepted by the defendant for a debt which he owed to *Ledger;* and even while *Ledger* kept it by him, it was a valid instrument and security, just the same as if it had been a promissory note given
[417] by the defendant to *Ledger* for value received. *Ledger* kept it for twenty days, and then, intending to favour the defendant by extending the time for demanding the money, he altered the date from which the bill was to run from the 1st to the 21st: this was a substitution of a new bill for the old one, giving him the further time; and not a correction of a mistake in drawing the original bill, of which there was no evidence: it was an extension of a prior valid security, and so intended to be at the time. The case of *Kershaw* v. *Cox*, tried before me when sitting for Lord *Kenyon* at *Guildhall*, first appeared to break in upon the general rule; but there was evidence there that the bill was originally intended to have been drawn payable to *the order* of the defendant; for he had instantly indorsed it over to the plaintiffs, without adverting to the omission of the words *or order;* and when the mistake was discovered the next day, the bill was immediately brought back to be altered, and the mistake was corrected by the consent of all parties: and this was ruled by me to be sufficient, upon the ground that it was altered to make it consistent with the original intention of the parties. And when the case was afterwards brought before the Court upon a motion to enter a nonsuit, when, I think, Lord *Kenyon* was in court, such an alteration was held to be allowed by the stamp acts; having been made merely for the purpose of rectifying a mistake in drawing the bill contrary to the intention of the parties at the time of making it. This is all that was determined by that case; and it is not to be pushed further.

BAYLEY, J. The utmost extent of the principle established by *Kershaw* v. *Cox*, and *Cole* v. *Parkin*, is that where an instrument
[418] on stamped paper has at first been drawn by mistake in a form not according with the intention of the parties, it may be corrected without a new stamp: but if the parties have altered their original intention and make a new instrument different from that which they originally contemplated; there a new stamp is necessary. This is the principle expressed in all the cases, and particularly in *Master* v. *Miller*. Now here, there was no correction of a mistake; for it was originally intended to be a bill at two months from the 1st of *August*, and the defendant accepted it as such: that then was an *issuing* of the bill, and is the same as if the de-

fendant had drawn a promissory note of that date and given it to *Ledger* as a security for his debt. When *Ledger* drew for the amount of his debt on *Taylor*, and *Taylor* delivered back the bill to him with his acceptance, that made it a perfect bill, and an available security. If *Ledger* were afterwards at liberty from time to time to vary the security, by bringing forward the date, that would be enabling him to make a new bill from time to time without a new stamp; which he cannot do by law.

Rule absolute.

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FENTON and Another, Assignees of R. and T. RENNARDS, Bankrupts, *against* PEARSON and Another.

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Tuesday, April 28th.

IN trover, brought by the plaintiffs, as assignees of *R.* and *T. Rennards*, bankrupts, to recover certain linseed, *Russia* mats, and linen bags, of the value of 1072*l.* 11*s.*; which the plaintiffs, in their declaration, alleged to belong to them, and to have been illegally converted by the defendants to their own use; the jury found a verdict for the plaintiffs for 1072*l.* 11*s.* at the trial before Lord *Ellenborough*, C. J. at *Guildhall*; subject to the opinion of this Court on the following case.

The plaintiffs are the assignees of *R.* and *T. Rennards*, who were merchants and copartners, residing at *Hull*, in *May* 1810, and were duly declared bankrupts in *February* 1811. The bankrupts, previous to *June* 1810, ordered *Brandt*, *Rodde*, and Co., merchants at *Archangel*, being then domiciled subjects of the Emperor of *Russia*, to procure for them a quantity of linseed, to be shipped for their account and risk; and shortly after sending such order, the bankrupts, for the purpose of bringing the linseed to *England*, engaged by a charter-party in their own names, as freighters, the ship *Juno* to sail from the *Thames* in ballast to *Archangel*, and on her arrival there, receive a cargo of linseed in bulk and bags, with mats for dunnage, to bring the same from thence to *Hull*, and there deliver her cargo to the freighters, their agents or assigns, agreeably to the bills of lading. By a licence duly granted on the part of his Majesty, dated the 22d of *June* 1810 (*a*), it was permitted to Messrs. *Schroder* and *Homan*, ship

(*a*) The exact terms of the licence, which was stated shortly in the case, were "for permitting the ship *Juno*, of about 180 tons, &c. bearing any flag except the *French*, to proceed in ballast from the port of *London*, or from any port north of the *Scheldt*, to *Archangel*, or any other port in the *White Sea*; there to load a cargo of such goods as are permitted by law to be imported, (except stock fish and fish oil,) and to proceed with the same to a port of the

A trading licence from the crown to *British* merchants to send a ship in ballast to an enemy's port, there to receive and load a cargo and import it into this country, by legalizing the purchase by the subject, legalizes the sale by the enemy, and impliedly legalizes the vendor enemy's right to stop the goods in transitu after their arrival in port here, upon the intermediate insolvency of the vendees, after a part payment only, (which was offered to be refunded) and also to employ an agent here for that purpose:

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and such agent having possessed himself of the goods, the assignees of the bankrupt vendees cannot recover from him the value of them in trover.

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agents, on behalf of themselves and other *British* and neutral merchants, that the said ship *Juno* might proceed in ballast to *Archangel*, or any other port in the *White Sea;* there to load a cargo of such described goods as she was afterwards in fact laden with, and to proceed with the same to a port of the United Kingdom. With this licence the *Juno* proceeded to and arrived at *Archangel* in *August* 1810, where she received on board the linseed, bags, and mats in question, (the bags containing part of the linseed, and the mats having been put on board for dunnage,) for *Brandt, Rodde,* and Co., who are natives of *Hamburgh,* and have one house of trade there, and another at *Archangel,* and who drew bills on Messrs. *Rennards* for the amount thereof. On the 9th of *September* following *Brandt, Rodde,* and Co. transmitted to Messrs. *Rennards* an invoice of the cargo, intituled "An invoice of the following goods, bought by order and for account of Messrs. *Rennards,* and shipped at their risk on board the *Juno,* bound for ." The invoice was accompanied by a bill of lading for the whole cargo as shipped by *Brandt, Rodde,* and Co., deliverable to their order, and indorsed by them. The
[421] *Juno* arrived at *Hull* with the goods in question on board her on the 6th of *December* 1810, when the defendants directly stopped the cargo as in transitu; the captain being then gone on shore with the ship's papers to Messrs. *Rennards.* The captain delivered the papers to Messrs. *Rennards,* who entered the cargo at the custom-house, and received a custom-house order for landing it; but the defendants previously possessed themselves of the cargo; having also, after the vessel's arrival, and after Messrs. *Rennards* had obtained their said order, made an entry at the custom-house in their own names, and received a similar order for the landing. The plaintiffs demanded the cargo of the defendants before the action brought, but they refused to deliver it up. Messrs. *Rennards,* before and at the time of the *Juno*'s arrival, were insolvent, and shortly afterwards executed an assignment of their property in a general trust deed, and had dishonored all the bills, except one for 406*l.* 13*s.* 6*d.*, drawn by *Brandt, Rodde,* and Co. for the price of the cargo. The defendants were, and acted as, agents for *Brandt, Rodde,* and Co., as far as they lawfully might, under the circumstances, be agents for a house of trade in *Russia,* between

United Kingdom: the master to be permitted to receive his freight, and depart with his vessel and crew to any port not blockaded; notwithstanding all the documents which accompany the ship and cargo may represent the same to be destined to any other neutral or hostile port, and to whomsoever such property may appear to belong," &c.

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which country and *Great Britain* there then subsisted and still subsists an open war. Offers were made by the defendants before the action was brought to refund to Messrs. *Rennards*, their trustees and assignees, the amount of the said bill for 406*l.* 13*s.* 4*d.* drawn for part of the price of the goods, which Messrs. *Rennards* had paid before their arrival; and to Messrs. *Rennards* and their trustees, to divide the cargo in the same proportion as the amount of the bills they had paid bore to the whole invoice price; which offers were refused. If the plaintiffs were entitled to recover the value of the cargo in question, the verdict was to stand; if not, a nonsuit was to be entered. [422]

Curwood, for the plaintiffs, admitting that since the case of *Bohtling* v. *Inglis* (*a*) the delivery of goods on board a ship chartered by the freighters did not prevent the right of the vendors from stopping the goods in transitu on the insolvency of the vendees freighters; contended that the vendors in this case, being alien enemies, could not authorize a subject of this country to stop in transitu on their behalf; and that such their general disability was not removed by the licence granted. Without the king's licence in time of war, it is a misdemeanor in a subject to trade with an enemy: and the subjects of a hostile country are considered as outlaws in regard to civil rights. *Littleton*, *s.* 196, &c. in treating of persons disabled to sue, classes outlaws and aliens together, which latter Lord *Coke* confines to alien enemies; and he states a special licence to sue as one of the means of remitting the disability. The question then is whether the licence here stated can have that effect? There is no case where a licence can be extended beyond the fair import of the words used. Suppose, instead of stopping the goods in transitu, the vendors had brought an action for the price of them; to which it was pleaded that they were alien enemies; and they had replied that they had imported the goods by the king's licence; would the production at the trial of a licence to other persons to import the goods have shewn a right in the vendors to import them? It will be said that the licence, being to import goods from an enemy's country, must impliedly licence the enemy's traders to send them hither: but every such licence, being an exercise of strict prerogative, superseding the ordinary rule of the common law, must receive a strict construction: and where the licence does no more than remit to a subject the disability of trading with an enemy, in favour of the subject, it cannot fairly be taken to extend the benefit in favour of [423]

(*a*) 3 *East*, 381.

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the enemy also. The Court of Admiralty have indeed in some late cases construed these licences with great latitude; but that has not been adopted by this Court. The consignees of goods are entitled to the possession of them as against all but the consignors (*a*), where the latter have a right to stop in transitu: that right then, being superseded in this case by their condition as alien enemies, could not be communicated to their agent, whose possession, derived through them, must therefore be wrongful.

Marryat, contrà. It is not necessary for the defendant to contend for the implied extension of the licence to the right of suit; for whatever be the construction of it, the plaintiffs have not made out their title to recover the goods out of the hands of the alien owners themselves. In an extended sense however, the licence, by authorizing the bankrupts' agents to purchase the goods of an alien enemy, necessarily authorized and legalized the sale by that enemy. The object of the licence was to procure the goods by purchase of the enemy, and it would have been an abuse of it to apply it to any other purpose. Either, then, it authorized the contract of purchase to which the enemy's trader was a party, in which
[424] case it necessarily authorized him to sell and receive the price, or otherwise to resume the possession while in transitu, as in all other cases of consignment; or if it did not authorize the sale in the enemy's country, then the consignees can have no title at all to the possession, and the plaintiffs can only recover by the strength of their own title. The legal and honest effect of the licence, however, is to legitimate the trade: and if it be not a licence to the *British* subject to purchase the cargo upon the terms of honest dealing between man and man, it is an instrument of fraud, authorizing a *British* subject, under pretence of purchasing a cargo, to defraud the owner of his goods. There can be no rule of law incompatible with common honesty and sound policy. It is true that an alien enemy cannot sue in our courts; but if brought into court as a defendant, it has never been decided that he may not defend his property, real, personal, or mixed, from wrong and robbery, as he may his person from lawless violence. An alien enemy has a right to hold property until he be dispossessed of it by the crown, and even the king cannot seize his property or debts without an office found. The cases on this subject are collected in 1 *Com. Dig.* tit. *Alien*, *c.* 3, 4. and in *The Attorney-General* v. *Weeden* (*b*). [Lord *Ellenborough*, C. J. It occurred to me

(*a*) *Davis* v. *James*, 5 *Burr.* 2680. *Dawes* v. *Peck*, 8 *Term Rep.* 330.
(*b*) *Parker*, 267.

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at one time that the defendants might be considered as having stopped the goods in transitu for the benefit of the crown; if the authorities which shew that the crown has no title till office found do not rather make against that defence.] This importation was made by *British* subjects, and not by alien enemies; and it is found that the defendant stopped the goods for the benefit of the aliens. [Lord *Ellenborough*, C.J. But though they stopped the goods nominally for the aliens, yet if the king would have a right to seize them when stopped, the stoppage would in effect be for his majesty's benefit. *Bayley*, J. Why may not the right of the king be used for the benefit of the aliens as against the plaintiffs, who have no just claim against them?] The king alone can defeat the possession of the alien enemies: they have a qualified property till devested by the crown: they have an actual possession, which the plaintiffs can only recover from them by shewing a preferable right in themselves to the goods. If the aliens had even brought an action for the price, they would only have been subject to a temporary disability to sue during the war: they cannot, therefore, be in a worse condition by having got possession of the goods: yet if the plaintiffs can recover in this action, it will operate as a perpetual transfer of the property. [Lord *Ellenborough*, C.J. The plaintiffs recovering possession of the goods in this action would not affect the right of the aliens to recover the price of them upon a peace. *Le Blanc*, J. Suppose the owners of the goods had embarked with them in the same ship, retaining the actual possession of them; could the plaintiffs have recovered the value from them without paying the price?] The bankrupts had no property in the goods except what they had acquired by their contract with alien enemies, all trading with whom is illegal except by the king's licence; and it would be contrary to the king's intention in granting this trading licence, that the bankrupts should entitle themselves to the possession of the goods, even as against the aliens themselves, without paying for them. Then as to the part payment for the goods by the bill for 406*l.* 13*s.* 4*d.*, that was held in *Feise* v. *Wray* (*a*) not to take away the vendor's right to stop in transitu for the remainder of the price: besides, the part payment was offered to be refunded.

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Curwood, in reply, observed that the right of the crown upon office found could not vary the question between the parties in this case, as no office had been found: and that the intervening bankruptcy precluded all imputation of fraud and dishonesty in the

(*a*) 3 *East*, 93.

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transaction, and reduced it to a mere question of legal right: as the aliens, upon a peace, would be entitled to share the bankrupt's effects equally with the other creditors.

Lord ELLENBOROUGH, C. J. The crown does not give to any man a roving commission to steal from or defraud even its enemies of their property: if it authorize a subject to buy goods from an enemy, it must be taken to authorize the enemy to sell them. The alien enemy, therefore, has a right to stand in court as defending a legal contract for the sale of his goods, authorized by the king's licence, with the power incident to such a contract: and I should be ashamed to be the subject of a country which should be so base as to hold out a lure to aliens to sell their property to its own subjects, and then enable the vendees, as soon as the property was thus brought within their grasp, to seize and apply it to their own use, without paying the owners for it. The king has granted a licence in these terms.—He permits the ship *Juno*, &c. (His lordship read the licence before stated.) Then giving the bankrupt traders the benefit of making them privies to this licence,
[427] which is addressed to Messrs. *Schroder* and *Homan*, on behalf of themselves and other *British* and neutral merchants; and giving them the benefit of a licence to purchase goods of the enemy, which I presume was the purpose intended by the licence; though if construed according to the strict letter of it, it is not a licence to buy, but to load a cargo; but such a construction would outrage common sense, and therefore I consider it as a licence to them to purchase the goods at *Archangel*, or other port in the *White Sea*, and to contract with the enemy for that purpose; then it legalizes the purchase and contract with the enemy; it gives to both parties the benefit of the contract; it therefore authorizes the vendors to stop the goods while in transitu for securing payment, and for that purpose to employ an agent in this country on their behalf. Any other construction of the licence than this would be holding out to *Europe* that this country would allure foreigners by the king's licence to send their goods to this country, and then take the goods without paying for them.

GROSE, J. The king's licence cannot legalize the purchase on the part of the subject, without legalizing the sale by the alien enemy.

LE BLANC, J. Here the alien enemy does not come into court to sue for the price of his goods; but the plaintiffs insist that they have a right to take them away from him without paying for them: but I agree that if the licence legalizing the importation of the goods into this country from an enemy's port, where it must be

presumed they can only be obtained by purchase, legalize the purchase there by the subject, that necessarily legalizes* the sale by the enemy, and that impliedly legalizes his right to stop the goods in transitu to secure payment on the insolvency of the vendees.

BAYLEY J. agreed.

Postea to the Defendants.

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SCOTT and Others, Assignees of G. M. JUKES, J. LANGLEY, and E. JUKES, Bankrupts, *against* FRANKLIN.

Tuesday, April 28th.

THIS was an action of assumpsit, in which the plaintiffs declared as "assignees of the estate and effects of *G. M. Jukes, F. Langley,* and *E. Jukes,*" against the defendant, and stated in the first count, That the defendant, on the 8th of *June* 1810, drew a draft or order, in writing, for the payment of money, commonly called a cheque, on Messrs. *Godwin* and Co., and thereby requested them to pay to *E. Wavell* or bearer 500*l.*, and delivered it to *Wavell;* and that *Wavell* duly transferred, assigned, and delivered the draft to the bankrupts before their bankruptcy, who thereby became the bearers. That the draft was duly presented for payment and refused; of which the defendant had notice; whereby he became liable, and promised the bankrupts to pay them the amount of the draft. The declaration also contained counts for money lent, paid, had and received, and on an account stated, before the bankruptcy; a count on the same bill calling it a cheque, and stating the promise to pay it to have been made to the assignees, and on account stated with the assignees; with a general breach for non-payment. Plea non assumpsit. At the trial before *Chambre,* J. at *Winchester,* a verdict was found for the plaintiffs for 520*l.*, subject to the opinion of the Court upon the following case.

For some time prior and up to the time of drawing the cheque in question, the three bankrupts carried on the business of bankers at *Gosport,* in the firm of *Jukes, Langley,* and *Jukes.* Two of the bankrupts, *G. M. Jukes* and *J. Langley,* also carried on business as merchants in *London,* in co-partnership with *J. Willis* and *J. G. Jackson.* On the 30th of *June* 1810, a commission issued against

A banker has a lien for the amount of his balance upon money securities paid in by a customer on his running account; and the banker's assignees, after his bankruptcy, may sue the drawer of one of those securities, made payable to bearer, who defended the action on behalf of the customer, and may recover

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against such drawer the amount of the balance; and this, notwithstanding an offer made to the assignees on the part of the customer before the action brought, that he was not aware of the exact balance, but that *if any were due, he was ready to pay it,*

on receiving back the security; for this was no tender of the balance to defeat this action.

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the four, and the plaintiffs were duly chosen assignees under that commission, and an assignment was executed, dated the 30th of *July*, in that year; on which *July* a separate commission of bankrupt was issued against *E. Jukes*, the other partner in the *Gosport* bank, under which the plaintiffs were also duly appointed assignees. This latter assignment bears date 24th of *July* 1810. The formal parts of the case under boththe bankruptcies were either admitted or proved. *G. M. Jukes* and *J. Langley* committed acts of bankruptcy on the 10th, and *E. Jukes* on the 13th of *June* 1810. But the defendant objected that the form of the declaration was wrong, in describing the plaintiffs as assignees of the estate and effects of the three partners; and that it ought to have stated the separate assignments under each of the commissions above-mentioned. The learned Judge over-ruled the objection, but reserved the point, which forms the first question for the consideration of the Court.

[430] Upon the merits, the facts were these. *E. Wavell*, the payee of the cheque in question, kept an account with *Jukes, Langley*, and *Jukes*. On *Saturday* the 9th of *June* 1810, about four o'clock in the afternoon, *Wavell* paid into the house of *Jukes, Langley*, and *Jukes*,

	l.	*s.*	*d.*
In cash - - - - - -	300	0	0
A bill drawn by *Wavell* on *Borrodaile* and Co. 5th *June* 1810, payable at six months' date -	137	12	0
A bill on *Dawson* and Co., drawn by *Wavell*, dated , payable at - - - -	19	10	0
And the cheque in question drawn by the defendant on *Godwin* and Co. dated the 8th of *June* 1810, and payable to *Wavell* or bearer - -	500	0	0

Previous to the making of this payment, the general as well as the cash balance of *Wavell's* account was in favour of the three bankrupts, as bankers. By this payment the general balance, including the bills and cash then paid, and all other bills, "but exclusive of a sum due to the three bankrupts for interest and commission, amounting to 73*l.* 13*s.* 1*d*," was turned in favour of *Wavell*, to the amount of 518*l.* 13*s.* 4*d.*, and of course deducting the cheque in question, to the amount of 18*l.* 13*s.* 4*d.* But after deducting the sum of 73*l.* 13*s.* 1*d.* due for interest and commission to the three bankrupts, then the balance, excluding the cheque for 500*l.*, will be to the amount of 54*l.* 19*s.* 9*d.* in favour of the said three bankrupts. But the cash balance at that time was still greatly in favour of the said three bankrupts, as bankers; for the sums which

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stood to the credit of *Wavell*, amounting to 3000*l.* and upwards, consisted of bills not due, which remained in the hands of the said three bankrupts, or in the hands of their correspondent in *London*, to whom they had been remitted for the purpose of obtaining payment; all of which bills, except that on *Borrodaile* for 137*l.* 12*s.*, and that on *Dawson* and Co. for 19*l.* 10*s.*, have been since paid, and were so before this action was commenced. In the evening of the 9th of *June* the shop of the bankers was shut up at the usual hour, and was never re-opened. On *Monday* the 11th of *June* the cheque for 500*l.*, stated in the declaration, was presented for payment and refused; of which the defendant had due notice. The bill on *Dawson* for 19*l.* 10*s.*, paid in on the 9th of *June*, has been dishonoured, and is still unpaid. The bill for 137*l.* 12*s.*, on *Borrodaile* and Co., was on the 10th of *June* 1810, with only *Wavell's* blank indorsement upon it, paid to Mr. *Cruikshank* who also kept cash with *Jukes, Langley, and Jukes*, and who caused it to be presented for payment when it became due, but the payment was refused. *Wavell* had notice of the dishonor, but has not been yet pressed for payment, and no notice of such dishonor was ever given either to *Jukes, Langley, and Jukes*, or their assignees. On the 24th of *Jan.* 1811, a few days before the action was commenced, Mr. *Cruikshank*, as solicitor to *Wavell*, applied to Mr. *Ritchie*, one of the plaintiff's assignees, and gave him notice not to proceed against the defendant; and at the same time said that he, (Mr. *Cruikshank*,) was not aware of the exact balance between him and the three bankrupts; but that if any were due, he was ready to pay it to Mr. *Ritchie*, as assignee, on delivery of the cheque. Mr. *Ritchie* answered that he did not know how the balance stood, but would write to Mr. *Boswell*, the plaintiff's solicitor, and give an answer in two or three days. Mr. *Cruikshank* did accordingly write to Mr. *Boswell*, who refused to return the cheque. It was contended for the defendant, that the plaintiffs could not recover from him the whole amount of the cheque, and interest, but only 54*l.* 19*s.* 9*d.*, being the amount of the general balance due from *Wavell* to the bankrupts on the 9th of *June* 1810: or at most the sum last mentioned, with the addition of the two sums of 19*l.* 10*s.* and 137*l.* 12*s.*, being the amount of the two dishonored bills. The questions reserved were, 1. Whether the plaintiffs can recover on the declaration as it is now framed? And if they can, 2. For what sum the verdict was to be taken? If upon the first question the Court should be of opinion that the plaintiffs can recover, the verdict was to be entered for such sum as the Court, upon consideration of the second question, should direct. If the Court should be of opinion that the plain-

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tiffs cannot recover upon this form of declaration, a nonsuit was to be entered.

Gaselee, for the plaintiffs, stated the question of form to be, Whether they had properly described themselves in the declaration to be the assignees of *three* bankrupts, who were the *Gosport* bankers, into whose bank the defendant's check was paid; the fact being that two of them were also partners with two others in a mercantile house in *London*, and there having been one joint commission against the four merchant partners in *London*, and another separate commission against the third banking partner in the *Gosport* bank, under both which commissions the plaintiffs were chosen assignees? If this form of declaring necessarily imported that the [433] plaintiffs were assignees under a *joint* commission only against the three bankrupt bankers, then he admitted that there was a variance between the declaration and the proof: but he contended that it did not; and that this mode of declaring was adapted as well to separate commissions against each, or as in this case to a joint commission against two, and a separate commission against the other, as to a joint commission against all; and so it was considered in *Streatfield* v. *Holliday*, (*a*). It is sufficient that the entire rights of the three bankrupt bankers are represented by the plaintiffs; and it cannot be material for the purpose of this action, and as against a defendant who is indebted to the three, in what manner the assets are to be marshalled when recovered. The plaintiffs as assignees under the joint commission against the two *Gosport* bankers and the two *London* merchants, are entitled to two-thirds of the estate and effects of the *Gosport* bank; and under the separate commission against the third banker, they are entitled to the remaining third of that estate. This very point, he said, had been ruled by Lord *Ellenborough* at nisi prius, about two terms ago. The next question was whether the assignees of the bankers were entitled to recover the whole amount, or a part only, and what part, of the cheque drawn by the defendant? And as against him, he contended that they were entitled to recover the whole amount, whatever the question might be, as against *Wavell* their customer, who had paid it into the bank. But *Bayley*, J. saying that *Wavell* might be considered as the real defendant in this case; *Gaselee* said that the assignees did not wish to press the question fur- [434] ther than to secure to the bankrupts' estate that which the law would give them as against *Wavell*. He submitted however that the bills having been paid into the bank by *Wavell*, on his general account, and

(*a*) 3 *Term Rep.* 779.

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not for a special purpose merely, or upon a special condition which had not been complied with, the assignees were entitled to recover the whole amount, leaving *Wavell* to prove under the commission for the balance of his account. [Lord *Ellenborough*, C. J. The bankers had a lien upon the bills to the amount of their advance to *Wavell*, but those bills were not like cash mixed indiscriminately in the mass of the bankers' property. There has been a very recent determination upon this point on the other side of the hall, where bills to a very large amount having been paid by a customer into a banking house, which immediately afterwards failed, the bankers were held only to have a lien on the deposit to the extent of their advance to the customer.] In the case of *Bent* v. *Puller* (*a*), it turned out that the bankers were not in advance to their customers; and yet the latter having paid in bills upon their general running account, and not for a specific purpose, it was held that they could not recover them in trover from the assignees of the bankrupt bankers. The same principle was before admitted in *Took* v. *Hollingworth* (*b*); but the majority of the Court considered it as the case of a particular appropriation, a deposit of one set of securities against another. The same consideration was had of the case of *Parke* v. *Eliason* (*c*). And the case of *Giles* v. *Perkins* (*d*), which seems to press most against the plaintiffs, is distinguishable from the present, inasmuch as the customer was actually a creditor [435] of the bankers when he paid in the long bills which were the subject of the action, and at the time of their bankruptcy: whereas here the balance was in favor of the bankers, independent of the cheque in question. But if the plaintiffs be not entitled to recover the whole amount of the bill, at any rate they are clearly entitled to recover the 54*l.* 19*s.* 9*d.* and the amount of the dishonored bill for 19*l.* 10*s.* With respect to the dishonored bill of 137*l.* 12*s.* it may be more doubtful, if the bankrupts' estate be not prejudiced by it. The rest of the bills are out of the question.

Moore, for the defendant, contended, on the first point, that the terms of the declaration imported that the plaintiffs claimed under a *joint* commission against the three bankrupts named; in which case the variance between the declaration and the evidence was admitted. But supposing the words might, upon the authority of *Streatfield* v. *Halliday* (*e*), import either that, or a separate commission against each, or a joint commission against two and a separate commission against the third; that would not help the present case, which does not come within either of those suppositions;

(*a*) 5 *Term Rep.* 494. (*b*) *Ib.* 215., and 2 *H. Blac.* 503., in Error.
(*c*) 1 *East*, 544. (*d*) 9 *East*, 12. (*e*) 3 *Term Rep.* 779.

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for the plaintiffs do not derive title under a joint commission against any two of the bankrupts named, but under a joint commission against two of them and two others: that is quite a different title, and the commission being entire cannot be severed. Even though assignees under a joint commission against several might maintain an action to recover a debt due to one of the bankrupts separately, which is not expressly decided in *Smith* v. *Goddard* (*a*); yet it seems
[436] they must declare as assignees of all. [Lord *Ellenborough*, C. J. If joint assignees could not recover the separate debts of one or more, there would be an end of all power of enforcing such demands; for there cannot be distinct representatives of the same person.] Without pressing that point, it is sufficient for this purpose if the assignees of four persons cannot sue for a debt in which two of them have no interest. [Lord *Ellenborough*, C. J. There are no more persons plaintiffs in this cause than must sue for a debt owing to the three bankrupts in whose right they sue, and all are interested: the only question will be as to the marshalling of the assets when recovered, with which the defendant has no concern. *Le Blanc*, J. After the separate debts are discharged, the surplus will be liable to the joint fund.] Then supposing that assignees under a joint commission against four could sue for a separate debt due to two of the four; that would not decide the present case, where they are suing for a debt due to the two conjointly with a third. It is true that the plaintiffs happen to be also assignees for that third person: but that does not affect the question as to their title to recover a joint debt due to the three under a several title as to one of them. In the case of *Allan and Others* v. *Hartley and Another* (*b*), Lord *Mansfield* said that there could not be a joint commission against two or three partners: there must be either one joint or three several commissions against the three. That sustains the objection in this case. There should have been a joint commission against the four, and another joint commission against the three. [Lord *Ellenborough*, C. J. It would be nugatory to take out any other commission
[437] when these assignees, who sue, represent all the persons interested, and unite in themselves all the interest of those persons. *Le Blanc*, J. Supposing there had been a different assignee appointed under the separate commission against the one banker, could he not have united to sue with the assignees of the other two bankers under the commission against the four partners?] Then, secondly, a banker has no lien upon the securities of his customer deposited with him

(*a*) 3 *Bos. & Pull.* 465, 9.

(*b*) *M.* 25 *G.* 3. *B. R. Cooke's Bank. L.* cited in *Streatfield* v. *Halliday*, 3 *Term Rep.* 780.

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beyond the amount of his balance (*a*); and upon payment or tender of the balance, the customer has a right to withdraw his securities. Now here, before the action brought, an offer was made on the part of *Wavell* to pay the balance whatever it might be; and it was the bankers' own fault in not declaring the balance, which alone prevented a more formal tender: but a strict tender is not necessary to be proved, except upon issue joined on a plea of tender pleaded: for if the customer upon such an offer would have been entitled before the bankruptcy to have had the check delivered up to him, and would have been entitled to have maintained trover for it, the assignees cannot now be in a better situation. [Lord *Ellenborough*, C. J. Perhaps such a question might have been raised in an action of trover between those parties; but this is an action of assumpsit by the holder against the drawer of the check.] The action was brought after demand made of the check by the customer, with an offer to pay the balance, and notice from him not to sue the drawer: that notice determined the trust of the bankers: the assignees then became tortious holders against the customer, and therefore cannot be entitled to sue the drawer: in this view the form of the action is not material. [Lord *Ellenborough*, C. J. [438] This is a case of a bill payable to bearer, which was immediately due; and if it passed to the bankers at all by the delivery, it passed a legal and not a mere equitable interest.] It does not appear that the check was carried to the general account as *cash:* but if it were so considered, after the offer to pay the balance, it was the same as if the account had stood even. [Lord *Ellenborough*, C. J. How can this be considered as a tender of the balance? Is it meant to be argued that this offer on the part of *Wavell* to pay, if the bankers would tell him the amount of the balance, entitles the defendant to a verdict? It is talking about a tender, but is not a tender. The plaintiffs cannot be turned round in an action of assumpsit upon the note, the amount of which they are entitled as bearers to receive, without legal grounds, as by shewing a tender. But here was nothing in the shape of a tender to repel the plaintiffs' suit.] Then the only remaining question is to what amount the plaintiffs are entitled to recover. 34*l.* 19*s.* 9*d.* was the balance against the customer, if all the securities were paid, for which the bankers had a lien upon this check: and to this it must be admitted that 19*l.* 10*s.*, the amount of the dishonored draft, must be added; but not the other bill for 137*l.* 15*s.* of the dishonor of which no notice was given to the bankrupts or the

(*c*) By *Eyre*, C. J. in *Bolton* v. *Puller*, 1 *Bos. & Pull.* 546.

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assignees, after it had been passed by the bankrupts to a customer; for that was available to them as money paid.

Lord ELLENBOROUGH, C. J. I understand that the latter sum has in effect been abandoned by the plaintiffs' counsel: the whole case is therefore now disposed of: for, on the first question, these assignees, having in themselves all the interest of the three partners joint and separate, are entitled to recover whatever was due to them; and that right to recover is not repelled by the proof of any tender of their balance before the action brought. Then they are entitled to recover in this action the true balance, which consists of the two sums of 54*l.* 19*s.* 9*d.* and 19*l.* 10*s.*

Per Curiam, Let the Postea be entered accordingly.

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Tuesday, April 28th.

HOWE *against* SYNGE.

A deed granting an annuity within the time included by relation back in the property-tax act 46 *G.* 3. *c.* 65., reciting the agreement for the purchase at a certain price of a certain annuity, *free from the property or income tax*, and covenanting for the payment of it *without any deduction in respect of the property or income tax*, or other parliamentary taxes, &c. is not void in toto, but only to the extent of such disallowance.

THE plaintiff declared in debt upon an indenture made on the 29th of *May* 1806, between the defendant, *R. Dawson*, and *C. Hamilton* of the one part, and the plaintiff of the other part; whereby the defendant granted, during the lives of himself, *Dawson* and *Hamilton*, and the survivor of them, an annuity of 500*l.* to the plaintiff, by four equal quarterly payments in the year, *without any deduction or abatement whatsoever*. And the defendant thereby covenanted that he would well and truly pay to the plaintiff, during the lives of him, (the defendant,) *Dawson*, and *Hamilton*, and the survivor of them, the said annuity of 500*l.* *free and clear of and from all taxes, charges, rates, and other deductions whatsoever*, on the days and times, and in manner and form thereinbefore limited. The declaration then alleged that 1500*l.* for three years of the annuity had fallen into arrear and become due to the plaintiff, contrary to the defendant's covenant; whereby an action had accrued to the plaintiff to demand and have the said sum of the defendant.

The defendant craved oyer of the indenture, which recited that the plaintiff had contracted and agreed with the defendant for the purchase of an annuity of 500*l.*, to be paid to the plaintiff *free from the property or income tax*, and all other taxes and deductions whatsoever, during the lives of the defendant, *Dawson*, and *Hamilton*, and the survivor of them, for the price of 3000*l.*; such annuity to be secured in the manner therein mentioned; and that in

pursuance of the said agreement, the defendant, *Dawson*, and *Hamilton* had, by their bond of the same date as the indenture, become jointly and severally bound to the plaintiff in the penal sum of 6000*l.*, conditioned for the due payment of the annuity of 500*l. free from the property or income tax*, and all other taxes and deductions whatsoever, &c.; and that warrants of attorney to confess judgment thereon had been executed by the same obligors; the indenture witnessed that *in further pursuance of the said agreement* and in consideration of 3000l. in hand paid by the plaintiff to the defendant, &c. the defendant, *Dawson*, and *Hamilton*, jointly and severally granted and confirmed to the plaintiff, during the lives of the defendant, *Dawson*, and *Hamilton*, and of the survivor, the annuity of 500l. *to have, hold*, and enjoy the said annuity during the lives, &c. to be paid and payable to the plaintiff by four equal quarterly payments, &c. *without any deduction or abatement whatsoever thereout for or in respect of the property or income tax*, or any taxes, &c. whatsoever now or hereafter to be taxed, &c. or imposed upon the said annuity of 500*l.* or on the defendant, &c. in respect thereof by parliament or otherwise. And the defendant, *Dawson*, and *Hamilton*, severally covenanted for the payment to the plaintiff, during the lives, &c. of the said annuity of 500*l. free and clear of and from the property or income tax*, and all other taxes, &c. on the days and in manner and form thereinbefore appointed. Then followed other clauses, as that the judgments upon the bonds should be considered as securities only for the better payment of the annuity, and that no execution on them should be taken out until the annuity should be in arrear for 21 days, &c. and that on the extinction of the annuity, and payment up of all arrears, &c. satisfaction should be entered on the said judgment: also a clause of redemption, &c. It further appeared that a memorial of the deed was inrolled in the Court of Chancery on the 2d of *June* 1806, pursuant to the act. The defendant then demurred generally.

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Tindall now contended on his behalf, that the annuity deed was void in toto, on account of the stipulation for the payment by the granters of the property tax being part of the consideration of the agreement, and interwoven with and of the essence of the entire contract for the annuity, and not resting merely upon an independent covenant; as in *Gaskell* v. *King* (*a*), and *Wigg* v. *Shuttleworth* (*b*); in the latter of which this very case almost is

(*a*) 11 *East*, 165. (*b*) 13 *East*, 87.

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anticipated, and distinguished from that of an independent covenant. He observed that the property tax act, 46 *Geo.* 3. *c.* 65. received the royal assent on the 13th of *June* 1806, and by section 227. is made to take effect upon all contracts made from and after the 5th of *April* 1806, including therefore this contract, which was made in *May* 1806. Then sect. 115. enacts that "all contracts, covenants, and agreements made or to be made, &c. for payment of any interest, rent, or other *annual* payment aforesaid in full, without allowing such deduction as aforesaid, shall be utterly *void*" (*a*). Annuities, which are mentioned in the 114th section, are included in the words, "annual payments;" and the words of avoidance are not less strong in this statute than in the statute of usury, which it has been long ago held avoids the whole contract on which usurious interest is reserved, and not merely
[443] the excess. At the time of passing the property tax act, a clause for disallowing the deduction of the same tax under the name of the income tax was unlawful by a prior act, though not to the same extent as in this.

Richardson, contrà, was stopped by the Court.

Lord ELLENBOROUGH, C. J. The legislature do not avoid the deed itself, but only the contract for the payment without allowing the deduction for the tax. The words do not necessarily import that the whole contract is to be avoided, but only so much as disallows the deduction for the tax: indeed as the act refers to contracts then made as well as those to be made, it would have been unjust to avoid the whole.

The rest of the Court agreed, and said there must be judgment generally for the plaintiff, without specifying for how much, as was proposed from the bar.

(*a*) See sect. 195.

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BOWLER *against* WOLLEY.

The following case was sent by the Lord Chancellor for the opinion of this Court.

Tuesday, April 28th.

BY indentures of lease and release of the 5th and 6th of *April* 1805, the defendant conveyed to the plaintiff in fee of all that messuage, dwelling-house, or tenement at *Birchwood*, in the parish of *Alfreton*, in the county of *Derby*, with the orchards, buildings, &c. yards, gardens, homesteads, and appurtenances thereto belonging, as the same contained together by estimation 1A. 2R. 2P.; and also all those several closes or parcels of inclosed land situate at *Birchwood*, by the names, and containing the quantities, therein described, with the rights, members, and appurtenances thereto belonging and appertaining, &c. "except " and always reserved out of these presents, &c. all mines, veins, " beds, lymphs, and delphs of *coal*, lying within and under the " lands and hereditaments hereinbefore mentioned; *with liberty to* " *enter therein, and to dig and sink such and so many pits and shafts* " *as shall be proper for getting* ALL *such coal*, and to slack and coke " coals as near the mouths and shafts of the said pits as they con- " veniently can, and *to erect and use* any engines for getting or " unwatering such coal, and *to make* any ditches, soughs, drains, " or dams where necessary for carrying on and working the said " coal works, *except* as to such lands as lie within 150 yards of " the said messuage and building, *and except any homestead*, and to " lay on any of the lands all such materials as are proper for " carrying on the said coal works, and to use all necessary or con- " venient roads for the carrying off and selling the said coals and " cokes, or for any other of the above privileges, and all other " privileges necessary and convenient for getting, unwatering, and " selling the said coals and cokes: upon condition that *Wolley*, " his heirs, &c. shall fill up or level all such pits or shafts to a " solid level with the surface of the earth around the same, within " six months after the same shall cease to be used, &c., and restore " the same to the state of the adjoining lands, &c., and pay to " *Bowler*, his heirs, &c. yearly 30*s.* an acre for all gangways, " and for all coal-pit hills or roads yearly 2*l.* 2*s.* an acre, and shall " pay a reasonable compensation for all crops of corn, &c. which " shall be injured in working the said colliery, and make good all

A. conveyed to *B.* in fee a messuage, buildings, yard, gardens, and homestead, with the appurtenances, and certain closes of land *excepting* all mines of coal under the said lands and hereditaments; with liberty to enter and sink pits for getting *all* such coal, and to erect engines and make drains, &c. necessary for working the coal, *except* as to such lands as lie within 150 yards of the messuage and buildings, and *except* any *homestead*. Held that the seller thereby reserved to himself the right to dig coals under the messuage, buildings, and

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homestead, and within 150 yards of the same respectively; but was not entitled to sink pits, erect engines, or make drains within 150 yards of the messuage or buildings, or within the homestead.

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" injuries to any houses or buildings, hedges or fences from the " above privileges." The messuage, lands, and premises so conveyed, consisted of a certain messuage and buildings, yards, gardens, orchard, and homestead, containing by estimation 1 A. 2R. 20P., (the bounds of which were described in a plan,) and of other lands adjoining to the homestead and buildings. The plaintiff entered on the premises, and afterwards the defendant began to sink pits, and erect engines and works for digging and taking away coal, part of which works were within the distance of 150 yards from the buildings, and considerably within the distance of 150 yards from the ground called the homestead, on which the buildings stand; and by means of such works the defendant proceeded to dig and carry away great quantities of coal from and under the homestead, and the lands and premises lying within 150 yards of the homestead and buildings respectively. The plaintiff in *May* 1810 exhibited his bill of complaint in the Court of Chancery; stating the matters, and praying an injunction to
[446] restrain the defendant from erecting engines or works, or working for, digging, or getting any coal lying under the messuage or buildings and homestead, or within 150 yards from the messuage and buildings, and homestead respectively. And on the 28th of *July* 1810, the defendant was injoined from erecting any engines, working for, digging, or getting any coal, and from proceeding in working any shafts then sunk within, under, or upon the homestead, and within 150 yards from the messuage or tenement and homestead, until further order: and the present case was directed to be made for the opinion of this Court upon the following questions. Whether according to the due construction of the indentures of lease and release of the 5th and 6th of *April* 1805, the defendant has reserved to himself the right, and is now entitled, to dig coals from or under the said messuage or dwelling-house and buildings, or from or under the said homestead, or within 150 yards of the said messuage and dwelling-house, or buildings, or within 150 yards of the said homestead? And if the Court should be of opinion in the affirmative; then, Whether, the defendant has by the said indentures reserved to himself the right, and is now entitled, to sink pits and shafts, and erect engines for getting and unwatering such coal, and to make ditches, soughs, drains, or dams for working the said coal works, or to any and which of those acts within 150 yards of the said messuages, dwelling-house, or buildings, or within 150 yards of the said homestead.

The Court, after hearing the case argued by *Copley* for the

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plaintiff, and by *Reader* for the defendant, sent the following certificate to the Lord Chancellor.

This case has been argued before us by counsel: we have considered it, and are of opinion, that according to the due construction of the said indentures of lease and release of the 5th and 6th days of *April* 1805, the said defendant has reserved to himself the right, and is now entitled to dig coals from and under the said messuage or dwelling-house and buildings, and from and under the said homestead, and within 150 yards of the said messuage or dwelling-house, buildings, and homestead: but we are of opinion that he has not by the said indentures reserved to himself, and is not now intitled to sink pits or shafts, or erect engines for getting or unwatering such coal, or to make any ditches, soughs, drains, or dams for working the said coal works within 150 yards of the said messuage or dwelling-house and buildings, or within the said homestead; but we are of opinion that he is not restricted with respect to the said homestead, further than the said homestead itself.

ELLENBOROUGH.
N. GROSE.
S. LE BLANC.
J. BAYLEY.

CASES

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ARGUED AND DETERMINED

IN THE

COURT OF KING'S BENCH,

IN

Easter Term,

In the Fifty-second Year of the Reign of GEORGE III. 1812.

PART II.

Wednesday, April 29th.

The KING *against* The Inhabitants of PENDLETON.

Where a pauper had served a master under unstamped articles of agreement to work with him for three years, at certain rates of weekly wages, and under certain covenants; after

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which he had continued to serve his master for four years longer, without coming to any new agreement; though such unstamped writing cannot be received as evidence for the purpose of proving the agreement between the parties, yet the sessions may look at it for the purpose of seeing when it ceased to operate, in order to guide them in receiving parol evidence of service for the last four years, at wages; from whence the sessions might presume a yearly contract.

JOHN Langden was removed, with his wife and children, by an order of two justices, from the township of *Salford* to that of *Pendleton*, in the county of *Lancaster;* which order was confirmed by the sessions, on appeal, subject to the opinion of this Court on the following case.

John Langden was in the year 1782 engaged as a servant to Messrs. *Douglas* and Co. of *Pendleton*, by the following instrument, sealed and delivered, but unstamped. "Articles of agreement "made this 24th of *June* 1782, between *Thomas* and *William* "*Douglas* of *Pendleton*, in the county of *Lancaster*, on the one "part, and *J. Jebson*, cotton worker, near *Pendleton*, on the other "part, and *J. Longden*, of the other part; witnesseth that the "said *J. Jebson* hereby covenants and agrees duly and faithfully, "and *J. Longden* hereby convenants and agrees duly and faithfully, "to serve the said *T.* and *W. Douglas* in the capacity of cotton "workers, during the term of three years, night or day; and the "said *T.* and *W. Douglas* consent and agree to pay unto the said "*J. Jebson* 5*s.* 6*d.* per week for the first year, and to *J. Longdale* "6*s.* per week for the first year, 7*s.* per week for the second year, "9*s.* per week for the third year, in consideration of his due and "faithful sevices. And whatever time the said *J. Jebson* or *J.*

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" *Longden* shall be absent from their work, it shall be proportion-
" ally deducted from the amount of his wages. The present
" agreement to remain in full force for the said term of three years.
" (Then followed certain covenants not material to the question.)
" And for the due performance of this agreement and every ar-
" ticle thereof, the said *J. J.* and *J. L.* bind themselves and their
" executors in the penalty of 100*l.*" (Signed and sealed by the respective parties.)

The pauper served Messrs. *Douglas* and Co. during the time stated in the above-mentioned instrument; and after the expiration of that time, he continued on in their service for four years, without any thing further being said as to wages, and without any expresss engagement as to the time or conditions of such service. On the part of the appellants it was contended that there was no hiring for a year, under which a settlement could be gained; but the Court, being of opinion that a hiring might be *presumed*, confirmed the order.

J. Williams, in support of the orders, first argued that this was, and was entitled, an *agreement* between the parties, and was made before the st. 23 *G.* 3. *c.* 58. *s.* 1., which first made an agreement stamp necessary, it was receivable in evidence, though under seal. But even considering it as a deed, and as such requiring to be stamped by a prior act of the 17 *G.* 3. *c.* 50.; yet as it it was not produced for the purpose of making it evidence between the parties to it, nor as having any operation as a deed, but merely as affording a presumption that the subsequent service was under a continuation of a yearly contract of the same kind, he still contended that it might be received as evidence of the subsequent intention of the parties. But, 2dly, supposing the instrument was rejected altogether, which it must be, if rejected at all; then a presumption of a yearly contract may be made from the duration of the service. The law considers a general hiring as a hiring for a year. He referred to *Rex* v. *The Inhabitants of Lyth* (*a*), and *Rex x. Longwhatton* (*b*). [451]

Scarlett, contrà. The instrument being under seal could not be received in evidence for any purpose without a deed stamp. [Lord *Ellenborough* C. J. Supposing you to have succeeded thus far, address your argument to repel the presumption of a yearly hiring from the service in this case.] The terms on which the parties originally contracted having been reduced into writing, no parol evidence of any kind of contract between them could be received.

(*a*) 5 *Term Rep.* 327. (*b*) *Ib.* 447.

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[*Le Blanc*, J. No such objection to the reception of this evidence was taken at the sessions.] Then how can the Court say that the *presumption of a general hiring which the sessions drew was not derived from this improper source? [Lord *Ellenborough*, C.J. Laying the whole of the written evidence out of the case, is there not sufficient without it to presume a hiring?] The first objection still remains, that there can be no presumption of any contract from other facts, when it appears that the parties had contracted in writing. How could the Court know, without having the contract in evidence, whether it might not have been for a less period than a year; in which case the implication from a continuance of the service would be that it was under a similar contract for time. [*Le Blanc*, J. rejecting altogether the evidence of a written contract, the case would stand simply upon the fact of a four years' service, without evidence of any contract. Then may not a contract of hiring be presumed of the same duration as the service?] The case might have been different if no contract in writing had been shewn: but no presumption of the sort ought to be made when both the parties were living, and might be called as witnesses to prove the actual contract. *The King* v. *Lyth* (*a*), was the case of a servant in husbandry, who is always presumed to be hired for a year, unless the evidence shew a hiring for a less term. In *The King* v. *Longwhatton* (*b*), the mistress was dead and the servant a lunatic, so that there was no witness of the contract capable of proving it directly. In a subsequent case of *The King* v. *Hales* (*c*), the presumption of a hiring for a year for the second year was founded upon express evidence of a hiring by the year for the first year, though that hiring, being retrospective, could not confer a settlement. Presumptions in general, which are mere secondary evidence, are never admitted where primary evidence can be obtained. [*Le Blanc*, J. How was this contract capable of being proved?] It was not capable of *legal* proof; but that was the fault of the contracting parties. [*Bayley*, J. Suppose the master and servant had been examined, and they had said they had no recollection of the terms of the contract; might not the presumption have been made from the facts of the case? Suppose the respondents had rested their case on proof of a service for the last four years; could the appellant's parish have struck out that evidence by producing a written instrument, which they could not legally prove?] The objection to the want of a stamp may in some instances be got over, if the very terms of the contract may be inferred from the acts of

(*a*) 5 *Term Rep.* 327. (*b*) *Ib.* 447. (*c*) *Ib.* 668.

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the parties under it: but here, the commencement of the service being under a written contract, the presumption must either be that the contract still continued, or that the service was continued under the same terms.

Lord ELLENBOROUGH, C. J. The fact of the service is always capable of distinct proof; for it is collateral and subsequent to the contract itself. The pauper served: that is a fact to be proved by parol evidence. He served *T.* and *W. Douglas* at *Pendleton*: that also is proved by the fact. He served them there during three years; which is a shorter way of expressing that which the sessions meant to find as to the time of the service, by referring to the time mentioned in the instrument; and he afterwards continued to serve them for four years longer. He served without any thing being said as to wages. The stress of the argument seems rather to shew that there were no certain wages reserved than that there was no hiring for a year; for if there were only a general hiring, [454] the law presumes that it is for a year; and if the rate of wages were not specified, he would be entitled to reasonable wages. Then were not the sessions warranted from the fact of a service for four years, at wages, though not specified, to presume that it was under a hiring for a year? the law says that they may make such a presumption when there is nothing to repel it; and that makes an end of the case.

GROSE, J. The question meant to be put to us by the sessions is whether they did right in presuming a hiring for a year from a service for four years, at the rate of so much a week as was paid. We cannot say that they could not make such a presumption from the evidence.

LE BLANC, J. The argument has turned principally on the way in which the counsel would have put his case at the sessions. For any thing which appears to us, the sessions received the evidence of the written instrument without objection made to it at the time: for if they meant to state the question reserved by them to be whether that evidence was properly received, they would have stated that objection was taken to it, and asked the advice of the Court on its admissibility. But as far as we can see, the evidence was received without objection, and the facts stated in the instrument are joined on with the other evidence, which, without reference to the instrument, would probably have been stated more fully; and the pauper would then probably have proved that he had served in fact for four years after the expiration of the articles; having before served for three years under them; and received wages at the rate of so much a week during that time:

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and then the sessions would have sent to us to know whether they could from that evidence, putting the written instrument quite out of the question, have presumed a hiring for a year. And how can we say that they could not presume?

BAYLEY, J. If there were premises from whence the conclusion of a hiring for a year could properly be drawn, the justices in sessions were the proper persons to make that presumption. Now here there was a service for four years, and wages paid during that period, from whence they might draw the conclusion. But it has been argued here that inasmuch as the pauper served for some part of the time at least under a written instrument, unstamped, we cannot look at the instrument even to see for what time it enured, and that no parol evidence could be given of any contract with reference to the subject-matter of it. But though we cannot look at the unstamped instrument for the purpose of proving by it any agreement between the parties; for such is the general import of the stamp acts; yet the Court may look at it to see whether it applies to other evidence of a contract between them. As if a contract in writing be made, not stamped, for the sale and delivery of certain goods on certain terms, the Court in an action for the non-delivery of goods, upon a contract proved by parol evidence only, may look at the instrument to see whether it applies to the goods then sought to be recovered for: and if those goods were not included in the contract, parol evidence may be received of the contract sought to be recovered upon. So here, the Court might look at the instrument to see the duration of the first contract under it, in order to guide them in receiving
[456] parol evidence of the subsequent service, to which it did not apply.

Orders confirmed (*a*).

(*a*) There is a class of cases, which were not adverted to, shewing that where nothing is said in a contract of hiring about time, but a reservation of weekly wages, the presumption is that a weekly hiring only is intended: but it did not appear in this case how in fact the wages had been paid. See *Rex* v. *Newton Toney*, 2 *Term Rep.* 453. *Rex* v. *Hanbury*, 2 *East*, 423. *Rex* v. *Pucklechurch*, 5 *East*, 382.; and *Rex* v. *Mitcham*, 12 *East*, 351.

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The KING *against* EARNSHAW.

Wednesday, April 29th.

A conviction on the game laws, which, in negativing the qualifications of the defendant under the stat. 22 & 23 *Car.* 2. *c.* 25. *s.* 3. only alleged that *the defendant* had not, at the time of the offence committed, "lands or tenements, or any other estate of inheritance of the clear yearly value of 100*l.*, or for term of life, &c., or was in any other manner quali-

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fied," &c. is not sufficient, without also specifically negativing that he had an estate of inheritance of the clear yearly value of 100*l. in right of his wife.* But it is sufficient to state that he kept and used a dog *called* a *lurcher* to kill and destroy the game.

THIS was a conviction of the defendant upon the stat 5 *Ann. c.* 14, in which the information set out negatived, amongst the other qualifications mentioned in the statute 22 & 23 *Car.* 2. *c.* 85. *s.* 5., that *the said* John Earnshaw had at the time of the offence committed "*lands or tenements, or any other estate of inheritance* of the clear yearly value of 100*l.*, or form term of life," &c. or was "in any other manner qualified, employed, licensed, or authorized by the laws of this realm either to take, kill, or destroy any sort of game whatsoever, or to keep or use any lurcher for that purpose." And then it charged that the defendant, on the 7th of *November*, 52 *Geo.* 3. "at *South Crossland*, &c. did keep and use divers, to wit, *ten dogs called lurchers*, to kill and destroy the game, against the form of the statute," &c. The conviction afterwards proceeded to state that the justice called upon the defendant to shew why he should not be convicted of the offence charged, &c.; "who pleadeth and saith that he did use such dogs as aforesaid, but that he had a right so to do, *because one* Thomas Shaw, *who was qualified to keep and use such dogs, was out along with him at the same time and place;* but doth not shew to me the said justice any sufficient cause why he should not be convicted of the offence in the said information contained against him." It then stated the evidence of the witness in support of the charge, "that the defendant, on the said 7th of *November*, &c. at *South Crossland*, &c. *did keep and use ten dogs called lurchers*, to kill and destroy the game; and that he then and there saw the defendant running after and encouraging the said dogs in the pursuit of a hare." And further the witness negatived the defendant's qualification in the terms stated in the information. And thereupon the justice convicted the defendant in the penalty of 5*l.* for the offence aforesaid.

Richardson took objections to the conviction, 1st, that the defendant was sporting at the time in company with a qualified person. But the Court observed that though the fact was so stated by the defendant in his defence, yet it was not proved in evidence; and therefore the question could not arise. 2dly, He objected that the conviction does not negative (*a*) that the defendant was qualified by having an estaste of 100*l.* a year *in right of his wife*, which

(*a*) *Rex* v. *Hill*, 2 *Ld. Ray.* 1415. *Rex* v. *Jarvis*, 1 *Burr.* 148.; and 1 *East*, 643. *n.*

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is one of the qualifications of the statue of *Car.* 2. [*Grose*, J. It is negatived that he had any other estate of inheritance, or was in any other manner qualified.] It is only negatived that *he* had such estate, &c. *of his own;* for so it must be understood. The language of convictions should be at least as strict as of pleadings: and in pleading if a party allege his own seisin, he cannot prove it by shewing a seisin in right of his wife (*a*). The magistrate has no jurisdiction to proceed against him if he be qualified in right of his wife. 3d objection; the st. 5 *Ann. c.* 14. does not make it penal to use *any* dogs for the destruction of the game, but only dogs of a certain description, including lurchers. Now here it is not stated that the dogs used *were* lurchers, but only that they were *called lurchers.* It would not be sufficient in an indictment to charge the defendant with having committed a crime *called murder.* In the *Mersey and Irwell Navigation Company* v. *Douglas* (*b*), the plaintiffs in an action on the case of a nuisance in diverting the water of the navigation, after laying the venue at *Preston*, describing themselves as entitled to the free navigation of a river "there called the *Irwell;*" which was held not to be an allegation that the river *Irwell* ran at *Preston*, but only that it was *there called* the *Irwell.* So here the dogs used might be *called* lurchers at the place named, and yet not be such as are generally so called. [Lord *Ellenborough*, C. J. The dogs being stated to be of that description which are *called lurchers*, we must suppose that they were so called, and that they *were* lurchers. We must take the allegation according to the subject-matter, as applied to dogs.]

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Hullock, contrà, was desired to confine his answer to the second objection; and argued that the general allegation, that the defendant had not *any other* estate of inheritance of 100*l.* annual value, would not be true if he had such an estate in right of his wife. It is not necessary to use the very words of the act, if all the qualifications be substantially negatived. This conviction is drawn in the general form in practice, which, it appears, by a note in the late edition of *Burn's Justice*, was settled by Mr. *Dunning.* As to the third objection; *The King* v. *Hartley* (*c*) is decisive against it. In *The King* v. *Davis* (*d*), and in *The King* v. *Pearse* (*e*), the Court refused to grant a certiorari to remove a conviction, where the same

(*a*) See *Polyblank* v. *Hawkins*, *Dougl.* 329. The husband of a tenant in fee must declare in covenant on a seisin in fee in himself and his wife, in right of his wife. The seisin is in both in right of the wife. *Catlin* v. *Milner*, 2 *Lutw.* 1421, 5.

(*b*) 2 *East*, 497. (*c*) *Cald.* 175. (*d*) 6 *Term Rep.* 177.
(*e*) 9 *East*, 358.

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objection appeared on the evidence of the witness stated, that the defendant had kept and used a certain *engine called* a gun.

Lord ELLENBOROUGH, C. J. It has been settled that all the qualifications for killing game must be specifically negatived in the conviction; and that being so, there is no reason for dispensing with the terms in which they may be aptly and certainly negatived. Here one of the qualifications mentioned in the statute is omitted to be negatived; namely, that the defendant had an estate of inheritance of the annual value of 100*l.* in right of his wife: we must presume therefore that it could not have been truly negatived. It is always safer in these cases to follow the words of the act.

GROSE, J. agreed.

LE BLANC, J. If it had been only alleged generally that the defendant was not qualified according to law, the conviction would have been clearly bad; and I cannot distinguish between the case where none of the qualifications are specifically negatived, and where one of them only is omitted.

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BAYLEY, J. The statute itself makes the distinction between a qualification from an estate in his own, and one in his wife's right; and he cannot be properly said not to be qualified, without negativing both.

Conviction quashed (*a*).

(*a*) See the next case.

The KING *against* TAYLOR.

Wednesday, April 29th.

A groom attending his qualified master while using dogs for killing the game, and pursuing it by his master's command, is not liable to the penalty of the stat. 5 *Ann.*

THIS was a conviction of the defendant in the penalty of 5*l.*, upon the stat. 5 *Ann. c.* 14., for having on the 6th of *November*, 52 *Geo.* 3., at *Meltham*, &c. "kept and used divers, to wit, ten dogs called lurchers, to kill and destroy the game." No objection was taken to the form of the conviction, which was admitted to be correct in its several parts; but to the substance of the supposed offence, as set forth. Thereby it appeared that the defendant, when called upon for his defence against the charge in the information, "pleadeth and saith that he was then and there a servant or groom to *Thomas Shaw*, of, &c., and was then and there attending his said master by his special order as a servant. And the said *T. Shaw* upon his oath said the defendant was servant to him, and that he the said *T. Shaw* had theretofore in former years paid the duty of 5*s.* yearly for the defendant, and had returned him as an occasional

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groom, &c.; but the said *T. S.* paid the defendant yearly wages for his services, and that the dogs then *and there used as above-mentioned were the dogs of the said *T. S.*, who was admitted by the prosecutor to be qualified and licensed to kill game according [*461] to the statutes, &c.; and that the defendant had no dogs of his own at the time and place aforesaid; nor was he hunting or pursuing game on the said day but in the company and under the direction of the said *T. S.* But doth not shew to me, the said justice, any sufficient cause why he should not be convicted of the offence in the said information above contained against him." The conviction then proceeded to set out the evidence of the witness in support of the charge; who deposed that the defendant, at the day and place mentioned, "did keep and use ten dogs called lurchers, to kill and destroy the game; and that he then and there saw the defendant running after and encouraging the said dogs in the pursuit of a hare, and acting as the whipper-in of the said dogs." Upon this evidence the magistrate proceeded to convict the defendant.

Richardson objected that the defendant, who was merely a servant assisting his master, a qualified person, by his command, in the pursuit of the game, could not be convicted of the offence. The penalty is imposed on persons who shall *keep* or *use* certain dogs to destroy the game; but a servant assisting his master cannot be said to do either: it is the *keeping* and *using* of the master. *The King* v. *Newman* (*a*) is decisive against the conviction of such a person; for there the presence of a qualified person was deemed sufficient to protect his companion joined with him in the sport. [462] The only doubt which can be thrown on that doctrine arises from a report, in the last edition of *Burn's Justice*, of a nisi prius case, said to have been decided before *Lawrence*, J. at *Stafford* spring assizes, 1804. But there the person proceeded against was not the servant, and did not appear to have any connection with the qualified sportsman. He might have been an intruder upon the qualified man, and have used the dogs against his will (*b*). It could make no difference, he observed, in this case, that the defendant had not been returned as a servant.

(*a*) *Hill.* 13 *Geo.* 3. *Loft's Rep.* 178. and *Burn's Just.* tit. *Game.*

(*b*) I have reason to think, upon enquiry, that there were special circumstances in that case, which governed the decision of the learned Judge. The defendant, with some companions of his own, all unqualified, had gone out together with the intention of sporting, and had afterwards joined, for aught appearing, without invitation, the company of a qualified sportsman, and had taken an active part in the killing of the game. See *Lewis* v. *Taylor*, in the next term, 16 vol.

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Hullock, contrà, being called upon the Court, said that he could not contend that the act of the servant, hunting with his master's dogs by his command, was not the act of the master; and therefore that the master's qualification protected the servant: in which all the Court agreed: and Lord *Ellenborough*, C. J. observed, that unless the master's protection extended to his servants, every qualified person must be his own huntsman and whipper-in.

Per Curiam, The conviction quashed.

The KING *against* The Inhabitants of HADDENHAM.

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Wednesday, April 29th.

An attainted felon having been discharged by order of the secretary of state, under the sign manual, signifying his majesty's pleasure to grant him an unconditional pardon, and directing his name to be inserted in the next general pardon, (of the issuing of which pardon there was some negative evidence;) and having afterwards purchased a copyhold for more than 30*l*., to which he was admitted upon surrender formally made, and resided on and received the issues and profits of it for nine years without impeachment of

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his title; gained a settlement by such residence thereon for 40 days, and communicated such his settlement to an unemancipated child, part of his family.

TWO justices by their order removed *Elizabeth Hill* from *Thame* in *Oxfordshire* to *Haddenham* in *Bucks*; which was confirmed by the sessions, on appeal, subject to the opinion of this Court on the following case.

Elizabeth Hill was born in the parish of *Thame* in *May* 1791, and has not acquired any settlement in her own right; and at the time of her birth the settlement of her father *Solomon Hill* was in *Thame*. It was admitted that at the *Lent* assizes for the county of *Gloucester* in 1790, *Solomon Hill* was convicted of horse-stealing, and received sentence of death. The following instrument under the royal sign manual was then produced: "*C. R.* Whereas "*Solomon Hill* was, at the last assizes holden for our county of "*Gloucester*, tried and convicted of horse-stealing, and had sentence "of death passed upon him for the same; and whereas some fa- "vourable circumstances have been humbly represented unto us "in his behalf, inducing us to extend our grace and mercy unto "him, and to grant him our free pardon for his said crime: Our "will and pleasure therefore is that you cause him the said *Solo-* "*mon Hill* to be forthwith discharged out of your custody, and that "he be inserted for his said crime in our first and next general "pardon that shall come out for the *Oxford* circuit, without any "condition whatsoever: and for so doing this shall be your war- "rant. Given at our Court at *St. James*'s this 12th day of *May* "1790, in the 30th year of our reign. By His Majesty's com- "mand, *W. W. Grenville*. To our trusty and well beloved our "justices of assize for the *Oxford* circuit, the high sheriff of our "county of *Gloucester*, and all others whom it may concern." The case further stated that search had been made in the office of clerk of assize of the *Oxford* circuit, and that it did not appear that any general pardon, including the said *Solomon Hill*, had been made out, or that there was any other general pardon for the said circuit to

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be found in the said office from the time of the conviction of the said *S. Hill*, whilst the late Mr. *Meredith Price*, the then clerk of assize of the said circuit, held that office; and that it did not appear to the Court by any other evidence that any such general pardon, including the said *S. Hill*, or any special pardon to him under the great seal, had been granted. That pursuant to the direction of the instrument under the sign manual aforesaid, the said *S. Hill* was shortly after discharged, and has been since at large unmolested for his said crime. That in 1803 the said *Solomon Hill* purchased of one *J. Chapman*, for 100 guineas, two cottages with the appurtenances in *Haddenham*, copyhold of inheritance held of the manor of *Haddenham-with-Cuddington*, which were surrendered to the use of the said *S. Hill*, his heirs and assigns; and that he was thereupon admitted tenant thereof, according to the custom of the said manor; and immediately took possession of and resided on the premises so purchased by him, and still continues to reside on part thereof, and has sold and surrendered the remainder: and that he has not since done any other act whereby to gain a settlement.

Mackaness and *Abbott* in support of the orders. The pauper has gained a derivative settlement in *Haddenham* from her father, and [465] was not an object of removal within the jurisdiction of the justices by the stat. 13 and 14 *Car.* 2. *c.* 12.; for that statute only gives them power to remove persons wandering from parish to parish. The father, notwithstanding his attainder, might purchase land, though he could not hold it against the crown; and while he held it with the consent of the crown, and resided upon it, he was irremovable from it by the justices, and, continuing so for forty days, gained a settlement. This question has arisen upon what was said by Lord *Kenyon* in *The King* v. *St. Mary in Cardigan* (*a*); where after deciding, without doubt, that a father's settlement acquired before his attainder was communicated to his children, he added, that it would be another question whether the man himself could acquire another settlement after the attainder: and in a modern treatise (*b*) of this subject, 2 *Blac. Com.* 251, &c. and 4 *Blac. Com.* 381. are cited in support of an opinion that an attainted person cannot acquire a settlement by estate. But the conclusion is not warranted; for in *Co. Lit.* 2 *b.* it is laid down that a man attainted hath capacity to purchase to him and his heirs, although he can have no heir; but he cannot hold it; for the king shall have it by his prerogative. This by 2 *Hawk. ch.* 49. *s.* 50. is explained to be upon office found. In *Macdonald* v. *Ramsay* (*c*), such person was

(*a*) 6 *Term Rep.* 117. (*b*) 2 *Nolan*, 30. (*c*) *Fost. Cr. L.* 61.

held liable to a civil suit. It might have been a question whether the attainted person could have compelled the lord to admit him; but being admitted, he cannot be removed by the lord. If an attainted person be capable of taking a freehold, there is no reason why he may not take a copyhold. And *Watk. on Copyh.* 31. referring to *Co. Cop. s.* 35., says it may be observed generally, that those who are under no disability to take by grant, at common law, are capable of taking by copy. Thus the matter stands upon general principle: but the question is more favourable in this case after the discharge of the attainted person by his Majesty's command and under promise of pardon, by which he was lawfully at large. [Lord *Ellenborough*, C. J. His Majesty's command, thus signified by the secretary at state, would be an answer to an allegation in an indictment that the party was afterwards *feloniously* at large: but perhaps it might be too much to say more without a pardon under the great seal.] The sessions would have done well in presuming a pardon after twenty years had elapsed since the party's discharge; and certainly the secretary of state's letter was a competent authority to the sheriff and gaoler to discharge the prisoner. Besides the question of title arises here only collaterally; and it is not competent, upon a question between two parishes respecting the settlement of the pauper, for one of them to dispute his title to the estate, when the crown, which alone is interested against him, forbears to seize it, and impliedly sanctions his possession. The very case of *St. Mary* in *Cardigan* (*a*) shews that a settlement is not considered as an inheritance, nor governed by the technical rules of descent, which apply to real property; for there a child born after the attainder was held entitled to a derivative settlement from the father which he had obtained before. [Lord *Ellenborough*, C. J. A settlement is not at all analagous to an inheritance. By an attainder of the parents the children do not cease to be born of them, or to be part of their family.] A settlement, as Lord *Kenyon* said in that case, is no property; and the rule of law as to persons attainted is only that they cannot acquire *property*. He also said there that a settlement is not a franchise: therefore none of the rules as to franchises apply to it. This was a purchase of an estate or interest within the parish for more than 30*l.*; and that is sufficient within the stat. 9 *G.* 1. *c.* 7. *s.* 5. to gain the purchaser a settlement by residence hereon for forty days.

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Nolan and *Gurney*, contrà. In order to gain a settlement by

(*a*) 6 *Term Rep.* 117.

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residence on a man's own property, he must have some estate or interest vested in him (*a*); but an attainted person cannot hold freehold, and much less copyhold; and the sign manual, with the letter of the secretary of state, could not restore his capacity (*b*). The act of the 9 *G.* 1. *c.* 7. leaves the question where it was, if the purchaser were not capable of holding the property for himself. In the case of *St. Mary* in *Cardigan*, Lord *Kenyon* evidently pointed to a distinction between this case and a settlement obtained by a person before his attainder; and that distinction is founded, not upon any supposed analogy between an inheritance in land and a derivative settlement, but because of the incapacity of the party attainted to hold any interest in the land purchased by him, without which he himself can gain no settlement by residence on it, and consequently cannot communicate any to his children. [Lord *Ellenborough*, C. J. By whom could this man have been turned out during forty days' residence on the pro-
[468] perty?] Neither the surrender nor admittance operated to pass any interest. The passage from *Co. Lit.* 2. *b*, shews that an attainted person cannot hold a freehold; he is civiliter mortuus: and the crown holds from the time of his purchase. Office is not necessary to vest the title in the crown in case of an attainder: it is merely for information of the king's title, as it is said in *The King* v. *Wendman* (*c*), but not to give him title: he took the profits for the benefit of the crown. [*Bayley*, J. If no office were found, in whom would the fee be during the purchaser's life? *Le Blanc*, J. The fee certainly passed out of the vendor.] The fee did pass out of the vendor, but in whom it vests in the purchaser's life-time, before office found, is a disputed point. It should seem to vest in the crown, whenever, as in this case, the office is to inform, and not to entitle the crown. They referred to the case of *The Duke of York* v. *Marsham* (*d*). In this case of an attainder of a copyholder in possession, it would operate immediately as an escheat, and the lord would have a right to enter upon him immediately. And in this case of an attainted person becoming a purchaser of a copyhold, inasmuch as he was incapable of taking the oath or of serving upon the jury, or of performing any of the services of a liege man to the lord, both the

(*a*) *Rex* v. *Widworthy*, *Burr. S. C.* 109. *Rex* v. *Coldashton*, *ib.* 459. *Rex* v. *Painswick*, *ib.* 783. *Rex* v. *North Curry*, *Cald.* 137. and *Rex* v. *Chew Magna*, *ib.* 365.

(*b*) *Gully*'s case, 1 *Leach's Cr. Cas.* 115. *Fost. Cr. L.* 62.; and 1 *Blac. Rep.* 472.

(*c*) *Cro. Jac.* 81.

(*d*) *Hardr.* 432, 7.

surrender and admittance would be inoperative, and therefore the copyhold in trust would remain in the surrenderor. Though *Co. Cop.* states in several places that an outlaw may take by surrender, yet it is no where stated that an attainted person can so take. The case of *Benison* v. *Strode* (*a*) is express to shew that the estate of a copyholder for life absolutely determines upon his attainder, even without the entry of the lord, and without presentment made; which was merely for the information of the lord, who might enter before; and this too, after a pardon of the conviction, attainder, and forfeiture. The question there arose between the copyholder for life, and him in remainder to whom the copyhold had been granted after the death, surrender, forfeiture, or other determination of the first estate. The court said that after the person was attainted, he was no copyholder; he could not be of the homage, or accept a surrender out of court. Then if the purchaser attainted were not tenant, and had no right or title in the property, he was removable, and therefore could not gain any settlement by residence on it. [Lord *Ellenborough* C. J. How could the lord impeach his title against his own admission? Is there any case where a lord can impeach the title of the tenant whom he has admitted, upon the ground of an antecedent incapacity; must he not proceed in all cases as for a subsequent forfeiture?] The lord is merely a conduit-pipe to transmit the legal interest from the surrenderor to the surrenderee: but he knew nothing of the disability at the time; and if an attainted person cannot take a surrender, the admittance is of no avail. Then if an attainted person can only acquire property for the crown, but not for himself, he could not obtain a settlement through the medium of property so acquired. The doubt expressed by Lord *Kenyon* in the case of *St. Mary* in *Cardigan* (*b*) is of great weight in favour of the objection.

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Lord ELLENBOROUGH, C. J. It was only said by Lord *Kenyon* that whether the man could acquire a settlement after the attainder was another question from that which he was then called upon to decide; and so it was; but that was only declining to decide a larger question than he was there called upon to do. The point raised is of some doubt, and of more general importance than usually arises on settlement cases. In the form of it a purchase was made, which satisfies the terms of the statute 9 *Geo.* 1. (*c.* 7. *s.* 5.) that no person shall acquire any settlement in any parish for or by virtue of any purchase of any estate or interest in such parish

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(*a*) *T. Jones*, 189. *Pollex.* 617. (*b*) 6 *Term Rep.* 117.

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whereof the consideration for such purchase doth not amount to 30*l.* bonâ fide paid, for any longer time than such person shall inhabit in such estate, &c. Now this was in its form a purchase for more than 30*l.*, and he resided on it for more than 40 days, and he has not been removed from it. Who then was in a condition to remove him for the 40 days? The lord who has by admitting accepted him for his tenant, even if he could after that admission object to him, has not objected. If the lord had no notice of the objection at the time of the admission, I do not mean to say that he was afterwards precluded from making the objection: but he has not in fact objected; and the tenant has now continued for nine years in possession, and by the statute of limitations part of the rents, issues, and profits can no longer be recovered from him: so that if he had a defeazible estate during the first 40 days, he has held the estate undefeated for more than period, which cannot now be impeached. And whether or not the crown could have impeached his title, he has now held the estate under a title not defeated for above forty days.

The other Judges assented.

Orders confirmed.

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The KING *against* The Inhabitants of TERRINGTON.

After a settlement proved at the sessions by the appellants in a third parish, a rated inhabitant of such third parish is not a competent witness for the respondents to disprove that settlement; being directly interested in the judgment of the sessions on that question; inasmuch as the order, if confirmed, would be conclusive evidence of the settlement being at that time in the appellant's parish, upon a subsequent order of removal from thence to such third parish.

UPON the hearing of an appeal against an order of two justices, removing *William Spence* and *Ann* his wife from the township of the *Minster Yard-with-Bedern*, in the city of *York*, to the township of *Terrington*, in the North Riding of the county of *York*; the respondents proved a settlement in *Terrington*: whereupon the appellants produced evidence to shew that a subsequent settlement by hiring and service had been gained by *William Spence* in the parish of *Raisthorpe*. In answer to which the respondents produced the master of the pauper, *a rated inhabitant of that parish*, to disprove the fact of a settlement having been gained there. This witness was objected to as being incompetent, on account of interest: but the session overruled this objection, and received his evidence, which was material to the determination of the case; subject to the opinion of this Court on the question, Whether the witness was competent or not?

Hullock, in support of the order, in answer to the supposed objection to the competency of the witness as a rated inhabitant of a third parish, that the judgments of the sessions in favour of the respondents, upon his testimony, would be conclusive evidence of

the settlement of the pauper in the appellant parish at that time, and therefore in the witness's own favour, though that third parish was no party to the appeal then in judgment; said that the objection, if well founded, would at one sweep disqualify every rated inhabitant in the kingdom from* giving evidence upon a question of settlement between any two parishes; though there might be no subsequent removal to his own parish, or he might cease to be rated, or quit the parish before any subsequent removal was made: so that at any rate it was a very remote interest. [*The Court* observed that it was found as a fact in the case, that there was evidence before given of a settlement in *Raisthorpe:* and therefore the rated inhabitant of that parish was tendered as a witness to a fact between his own and the appellant parish.] Still he was not called to get rid of an immediate, but of a remote and contingent burthen. In *The King* v. *Kirdford* (*a*), a parishioner having rateable property in the parish, and liable to be rated, but omitted out of the existing rate at the time for the purpose of making him a witness, was held to be a competent witness, notwithstanding his future interest, more certain than in this case, by which he was more likely to be biassed. There are other contingencies also in this case: the witness might die before a removal of the pauper was made to *Raisthorpe*, or the pauper might acquire a new settlement in the mean time. To disqualify a witness there must be a certain and immediate benefit to be derived to him from giving his evidence in a certain way. As in *Howard* v. *Shipley* (*b*), Ld. *Ellenborough* said that if that were a case at common law, he should have little difficulty in saying that a person obtaining a verdict by his own evidence, which would enure to his own benefit, *not merely upon a probable and contingent expectation* that such would be the effect of his testimony, but where it is *the immediate* and natural effect of it, is a person at common law interested in the event, and therefore disqualified, &c. Besides, it does not appear that the witness was a rated inhabitant of *Raisthorpe* at the time of the hiring and service there: and if not then, the becoming so afterwards by his own act could not deprive the other parish, then interested in his evidence, of the benefit of it.

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Coltman, contrà. The rule was established in *Bent* v. *Baker* (*c*), that where the verdict and judgment, if according to the fact to be proved by the person tendered as a witness, would afterwards be

(*a*) 2 *East*, 559.

(*b*) 4 *East*, 181. The competency of the witness in that case was established upon the stat. 2 *G.* 2. *c.* 24. against bribery.

(*c*) 3 *Term Rep.* 27.

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available in his own behalf, there he is incompetent. Such was the case here: if the order of removal stand confirmed, it will be conclusive evidence of a settlement in *Terrington* at the time of the removal, even as between *Terrington* and *Raisthorpe* (*a*). As to the witness having only a contingent interest; his interest was not contingent at the time of his giving his evidence, which is the only time to be looked to; for he was then an inhabitant actually rated in the parish, which he came to exonerate from the liability of maintaining the pauper; and the immediate consequence of rejecting the witness would have been the quashing of the order of removal, on the ground that a clear settlement was established in his parish, to which the pauper would then have been removed. In the case of an action against a master for an injury done by the negligence of his servant to another person, the servant is no witness to disprove his own negligence, because he is answerable over to his master, if there be a verdict against the latter. It being
[474] clear that a rated inhabitant could not be a witness upon a settlement appeal, in which his own parish was a party, it would be strange and inconsistent if he could be a witness upon the same question, to be followed by the same ultimate legal result, between other parties. Upon the trial of an indictment at *Nottingham* against a parish for not repairing a highway, *Bayley*, J. lately held that a rated inhabitant of another parish, in which it was contended by the defendant that the highway lay, could not be a witness to disprove that fact.

Lord ELLENBOROUGH, C. J. The question is whether after primâ facie proof, on the part of the appellant, of a settlement in *Raisthorpe*, a rated inhabitant of that parish is a competent witness for the respondent to disprove such settlement, by which his own parish could never be charged with the maintenance of the pauper. It is contended that he is, because his interest is only contingent; that he may die before any removal takes place: but the same might be said in the case of the master; he may die before he can sue the servant, and the servant may never be called upon; yet he cannot be a witness for his master without a release. So this witness is affected with the same sort of interest: he was a rated inhabitant of *Raisthorpe* at the time; and his testimony was to relieve himself from all liability over in that character, if the settlement of the pauper were fixed upon the appellant parish: he therefore had an interest in giving that testimony at the time, as matters then stood.

(*a*) See *Rex* v. *Corsham*, 11 *East*, 188. and the cases there cited.

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GROSE, J. This point has often occurred at the sessions, and the general practice has been not to receive the witness.

*LE BLANC, J. We must consider how the question stood as to the interest of the witness when he was examined at the sessions. Evidence had been given by the appellants to show that the last settlement of the pauper was in *Raisthorpe*. A rated inhabitant of that parish was then called to disprove that fact, and to shew that no settlement was gained there; the object therefore of his evidence was to fix the pauper in *Terrington;* and when so fixed, that would conclude the question of his settlement as to all other parishes at that time, and the pauper could not afterwards be removed to *Raisthorpe* in respect of any previous settlement: whereas if the pauper's settlement were not fixed by the order of the sessions in *Terrington*, he would, upon the first evidence received, have been removed the next day to *Raisthorpe*. The doubt as to the settlement then resting between one or the other of those two places, the question is whether a rated inhabitant of *Raisthorpe* was not interested in the judgment of the sessions? He appears to me to have been directly interested; because his evidence, if credited, was for ever to relieve his own parish from the burthen of maintaining the pauper. But it is said that supposing he was interested at the time, yet circumstances might have happened afterwards to do away his interest: he or the pauper might die, or he might cease to be a rated inhabitant of *Raisthorpe*. It might be so; but the Court must see whether at the time he gave his evidence the witness was so interested, and it must be supposed that things would continue in the same state. It has been also said that the witness does not appear to have been a rated inhabitant at the time of the hiring and service in *Raisthorpe:* the contrary however is not stated: but supposing it was so, the question would still be whether he was interested at the time he was called to give his evidence. The only exceptions to this are either where a party to a suit has acquired an interest in the evidence of another; in which case that other shall not by any voluntary act of his own deprive the party of the benefit of his evidence; or in the case of a witness by necessity. But there is no necessity in this case: the fact of a hiring and service may be proved by other witnesses besides rated inhabitants of the parish. I am threfore of opinion that this person was not a competent witness, and that the decision of the sessions cannot be supported.

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BAYLEY, J. This person when called to give evidence had a direct and immediate interest in the question then before the Court; for a settlement had been proved by other evidence in

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Raisthorpe; and if that were rebutted by his testimony, the pauper would be settled in *Terrington:* if not rebutted, *Raisthorpe* would have been immediately liable to have the pauper removed to it: the witness therefore being a rated inhabitant of *Raisthorpe,* had an immediate interest in fixing the settlement in *Terrington.*

Order quashed.

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Friday, May 1st.

MENNETT and Another *against* BONHAM.

A licence granted by the secretary of state under an order in council, by virtue of the stat. 48 *Geo.* 3. *c.* 126. *s.* 2. to *P. B.* and *C.* (who were in fact *British* merchants residing here, but were not so expressed to be in the licence,) on behalf of *themselves* AND OTHERS to export goods on board a certain vessel, bearing any flag, except the *French,* from *London* to *any* port in the *Baltic,* (of which most were at that time hostile, but some were neutral) will not

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warrant an export of goods which were the property at the time of the shipment of an alien enemy, a *Russian* subject residing at *Petersburgh,* then a hostile port of the *Baltic,* to which place the cargo was consigned, and at whose desire the license was obtained by *P. B.* and *C.:* and therefore a policy effected on such goods by such ship from *London* to *Petersburgh,* in the names of *British* agents here, who averred the interest to be in the *Russian* alien enemy, was held bad; and that such policy was also unavailable to cover a loss occasioned by the seizure and condemnation of the assured's own government, after the arrival of the ship and cargo at *Petersburgh.*

THIS was an action on a policy of insurance on goods on board the ship *Elizabeth,* at and from *London* to port or ports, place or places, in the *Baltic,* backwards and forwards, including the risk of transhipment into boats, &c. with leave to seek, join, and exchange convoys, and exchange simulated papers and clearances and ship's papers, sail under any flag, touch, stay, and trade, at all ports and places and islands, for all purposes whatsoever, and take in and discharge goods wherever the ship might touch at. There was also a liberty to wait for information at or off any ports or places, and to take in and land passengers, without being deemed a deviation. And the insurance was to continue until the ship with the goods should be arrived at her final port or place of discharge, and against all risks whatsoever until the goods were safely deposited in the warehouses of the consignees. And in case it should not be deemed advisable for the ship to enter her port or ports of destination, or having entered to discharge, the risk was to continue until her arrival in *Sweden, England,* or elsewhere, all or either, and the goods safely discharged and warehoused. And in case of loss, capture, seizure, or detention by any power whatever, or under any pretence whatever, within the meaning of the policy, the underwriters engaged to pay such loss or claim, whatever the same might be, in two months after notice, without waiting for condemnation, restitution, or official documents; the affidavit of the assured or their agents being deemed a sufficient document, &c. The policy was subscribed by the defendant for 200*l.* The plaintiffs, who effected the policy as agents on the 22d of *June* 1810, averred the interest to be in one *Frederick Geiger,* and the loss to be by

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capture. At the trial before Lord *Ellenborough*, C. J. at *Westminster*, a verdict was found for the plaintiffs for 200l. subject to the opinion of the Court on the following case.

The *Elizabeth* being a neutral ship, and laden with the goods therein mentioned, sailed from *London* to *Petersburgh*, where upon her arrival, and before any part of the cargo was landed, the whole was seized and afterwards condemned by the authority of the *Russian* Government. The ship was restored to the master. The cargo was the property of and consigned to Mr. *Frederick Geiger*, who at the time of effecting the policy, and of the loss, was and now is a *Russian* subject resident at *Petersburgh*, and on whose account the assurance was effected. The ship sailed under a neutral flag. A licence was obtained for the voyage by the agent of *Frederick Geiger* at his desire; of which the following is a copy:— "To all commanders of his majesty's ships of war and privateers, and all others whom it may concern, greeting. I the undersigned, one of his majesty's principal secretaries of state, in pursuance of the authority given to me by his majesty, by order of council, under and by virtue of the powers given to his majesty by an act passed, &c. entitled, &c. (48 *Geo.* 3. *c.* 126), and in pursuance of an order of council specially authorizing the grant of this licence, a duplicate of which order of council is hereunto annexed; do hereby [479] grant this licence for the purpose set forth in the said order of council, to *Pedder Bluhm and Simon* (*a*) *on behalf of themselves and others, and to hereby permit them to load and export on board the vessel the* Elizabeth (*of* Hamburgh), *burden* 133 *tons, P. Winckelman, master, bearing any flag except the* French, *a cargo of* wine, brandy, cotton, wool, and such goods as are permitted by law to be exported, except hemp, *from* London *to any port in the* Baltic, with liberty to touch at a *Swedish* port, notwithstanding all the documents which accompanying the ship and cargo may represent the same to be destined to any neutral or hostile port, *and to whomsoever such property may appear to belong:* provided that the said cotton wool shall be cleared out within two months from the date hereof, and that the whole cargo shall be discharged at one port only in the *Baltic*, and that the time of her clearance from her port of lading shall be indorsed on this licence; otherwise the same shall be void and of no effect. And provided further that no licence shall have been obtained for the said vessel to proceed with any part of her cargo to any other port or place. This licence to remain in force

(*a*) This was left blank in the copy of the licence stated in the case; which blank is usually filled up by the description of the person named.

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four months from the date hereof; and at the expiration of the said period, or sooner if the voyage be completed, to be deposited, as the case may be, with the commissioners of his majesty's customs at the port of *London*, or with the collector of the customs at the out-ports. Given at *Whitehall* the 19th of *May* 1810, in the 50th year of his majesty's reign. (Signed) *R. Ryder.*"

[480] From the year 1807 to the times of granting the licence, effecting the policy, and from thence to the time of the loss, there was and yet is open war between *Russia* and this kingdom. If the plaintiffs were entitled to recover, the verdict was to stand: if not, a nonsuit was to be entered.

Barnewall for the plaintiffs made two questions: first, whether the licence extended to cover the property of a *Russian* alien enemy; for if so, this action was maintainable on his behalf by the *British* subjects, in whose names the insurance was made: and secondly, whether the loss having been occasioned by a condemnation under the authority of the *Russian* government was a bar to the right of recovery on behalf of the assured. 1st, The legality of the insurance depends upon the terms of the licence, and the intention of the crown in granting it, which was to cover *the trading* not only of the persons named, but of any *others*, between this and *any* port in the *Baltic*, whether hostile or not, and under *any* flag, *except* the *French*: the fair inference from which exception is that at least every other hostile interest except the *French* was in the contemplation of the crown. The policy and necessity of these licences having arisen out of the perplexed and agitated state of the continental powers under the influence or terror of the *French* arms, and such licences being considered to be equally beneficial to the subjects of this country as to those of the enemy, ought to have the most liberal construction in furtherance of that trade, and are neither in their form nor their objects like grants from the crown of its own revenues to a subject, to which on former arguments on this point they have been compared. Grants of that

[481] description were always made under the great seal, and were matters of record; but licences before the stat. 48 *Geo.* 3. *c.* 126. were granted under the sign manual, and since that statute by the secretary of state under the order of council in the manner thereby provided, and are not of record. The object of former grants was to diminish the public revenue for the benefit of the grantee: but the object of the licences is to encourage commerce, and thereby increase the revenue. In this view they have lately received very ample latitude of construction in the Courts of Admiralty. In

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Defflis v. *Parry* (*a*) Lord *Alvanley*, C. J. says, "we are not to construe the acts of government strictly against the merchants: if it had been intended that the licence should have been more confined, I think it would have been so expressed." In *Usparicha* v. *Noble* (*b*) Lord *Ellenborough*, C.J. said, "The crown may exempt any persons, and any breach of commerce, in its discretion, from the disabilities and forfeitures arising out of a state of war; and its licence for such purpose ought to receive the most liberal construction." The licences in both cases, though granted to *British* or domiciled subjects residing here, were extended to cover the property of enemies or persons domiciled in the enemies' country. The principal question is what was the intention of the *British* government in granting this licence; and that appears to have been to enable a trade to be carried on from *London* to any ports in the *Baltic* in a neutral ship, to which the ports of the enemy would of course be open. It is clear that government contemplated that this trade might be carried on by other persons than those particularly named, because it licenses them *and others*, whom it does not [482] name; and it is natural to suppose that as it does not confine those *others* to exporters residing here, it must have intended to include the persons resident at the several ports to which the goods were to be carried. Where the trade itself is politic, and intended to be licensed, it is a matter of small importance on whose individual account the particular adventure insured is carried on; it cannot benefit the alien enemy, without also benefiting the subject at home, who is engaged in it with him. Viewing such a trade as a matter of policy, the principal question would be at whose risk the outward voyage should be carried on: for if a licence be granted, either expressly or impliedly, to export a cargo of *British* goods from hence to an enemy's port, it is obvious that the government must have contemplated that the goods would become the property of an enemy when they arrived; and whatever difference it would make in the policy of such a trade, whether the risk of the voyage out was run by the *British* vendor, or by the foreign vendee and alien enemy, must be in favour of throwing it upon the latter, (which can only be done by suffering him to insure his risk here) for by these means the full profit upon the goods and the premium of insurance are secured to the *British* subject, against the chance only of a total loss.

2dly, It may be argued, upon the principle laid down in *Conway* v. *Gray* (*c*), that this insurance cannot protect a *Russian* subject

(*a*) 3 *Bos. & Pull.* 5. (*b*) 13 *East*, 340. (*c*) 10 *East*, 536.

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against a loss occasioned by the act of his own government; and primâ facie it may be admitted that every man shall be taken to be a party to the public authoritative acts of his own state. But this case is distinguishable from *Conway* v. *Gray*, for *there was no [*483] war existing at the time of that insurance between this country and *America*, nor any licence from the crown, as in this case, recognizing the disability of that state of things, and dispensing with it: but at an intervening embargo in the ports of the assured's own country altered the relative condition of the parties to the contract. In this case, the subject of the hostile state applied to this government for a licence to trade with us; an illegal act as against his own state; thereby evincing a previous intention to dissent from any act of that state by which the trade between the two countries should be impeded or defeated: and so far acting in unison with the *British* government. *Conway* v. *Gray* turned on the common presumption of assent on the part of every subject to the acts of his own state, where nothing appears against it: whereas the circumstances of this case raise a contrary inference upon positive evidence of the dissent of the *Russian* subject to the decree of his government interdicting commercial intercourse with this country; and our government by granting the licence has made common cause with him. This case, therefore, comes more within the principle of *Usparicha* v. *Noble* (*a*). [*Bayley*, J. The ship and cargo there were captured from the *Spanish* assured by the *French*, and were condemned by a *French* consular court sitting in *Spain*. Lord *Ellenborough*, C. J. asked in what terms the licence in that case was framed (*b*)?] The *Spaniards* really interested were not named in [484] it, or in the policy: the only difference from the present case was that it was a licence to trade to certain ports of *Spain* named; and this is to *any* port in the *Baltic*, and consequently including *Petersburgh*.

Scarlett, contrà, upon the first point. The construction put in the Court of Admiralty, in all the earlier decisions upon these licences, was that they were questions stricti juris, whether or not the adventure came within the precise terms of the licence. In the courts of common law the consideration has been pushed further, as well as to the general legality of such licences, as to the

(*a*) 13 *East*, 332.

(*b*) The full and entire substance of the licence there granted, a copy of which I have since seen, is stated in the printed report of the case; though it does not assume to give all the formal words of it; which led to a supposition that the whole nature of the adventure might have been stated; which was not the case.

right of the parties interested to sue upon contracts arising out of them. The king, though he may dispense with the exercise of his prerogative in exempting the property of his enemies from seizure in a particular case, cannot delegate the right of granting such dispensations to any other person. Assuming, therefore, that the king had intended by granting this licence to *Pedder*, *Bluhm*, and *Simon*, on behalf of themselves *and others*, to enable *Pedder*, *B.* and *S.* to adopt whom they pleased, even alien enemies; yet by law the king could not delegate that power to them. Thus it is said in *Calvin*'s case (*a*) that though the king may make letters patent of denization to whom and how many he will, yet he cannot grant to any other to make of strangers born denizens. So Lord *Coke* says (*b*) that the king may make a particular denization; as he may grant to an alien, quod in quibusdam curiis suis *Angliæ* audiatur ut *Anglus*, &c. to enable him to sue only: but it is clear that he could not enable another to grant such a privilege: and yet if the consequences now attempted to be deduced from these licences were [485] to be allowed, the same effect would be produced. In the year-book, 20 *H.* 7. 6. indictments were brought before justices of the peace within the liberties of the Abbot of *St. Albans*, which were removed into this court; and the defendants pleaded that the king had by his letters patent granted to the abbot and his successors that they should make their own justices of the peace within the liberties, with a ne-intromittent clause as to the justices of the county: and then alleged that the last mentioned justices had interfered and taken the indictments, by which they were void. To this the Attorney-General demurred, and contended that the king could not make such a grant. And the Court held the letters patent void; saying that it was the king's prerogative to pardon felons, or to make denizens, but that he could not delegate the power to do either to another. [Lord *Ellenborough*, C. J. Does not the act of parliament permit these licences to be granted by the secretary of state?] The act only enables the secretary of state to grant such licences as the king himself might have granted by his prerogative. [*Bayley*, J. Might not the king have said that any person might load the *Elizabeth*?] Admitting that he might, or that he could have dispensed with his right to seize her when loaded with the goods of an enemy, yet he could not delegate such powers to another, nor grant to another that he should enable an alien enemy to sue for the goods. The case in the year-book, 7 *Ed.* 4. 29, 30, 31. is material to this point. *Bagot* and *Swyrenden*

(*a*) 7 *Rep.* 25 *b*. (*b*) *Co. Lit.* 129.

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brought assize against *Thos. Ive* for the office of one of the clerks of the crown in Chancery. The defendant pleaded, 1st, that *Bagot* was born in *France*, out of the king's allegiance; and upon a doubt *whether that plea went to the writ sued by both; he pleaded, secondly, that there was no record of *Swyrenden*'s appointment to the office before the grant in question. It was contended for the plaintiffs, that the first was no good plea, because they hade made title to the office by the king's letters patent to them, and therefore they could maintain an action for it: and the case was put of a grant of land by the king to a monk professed, who, though dead in law, was able to maintain an action for all things concerning the land. But here *Bagot* was a person able, &c. They further contended, that as to *Swyrenden*, there was a double plea; for, that the first plea went to the whole writ; and therefore against him as well as *Bagot;* and the second plea was also against both. On the other hand, it was contended that the letters patent did not enable *Bagot* to maintain an action for that which was granted to him, and that he could not be so enabled without special words; for that the king's grant could not be taken to a double intent, but must be taken most beneficially for the crown. But finally the Court was of opinion, that as the second plea pleaded against *Swyrenden* went to the whole writ, the defendant had pleaded two pleas against *Bagot;* therefore the defendant relinquished the former pleas. And afterwards in *T.* 9 *Ed.* 4. (fo. 7.) the defendant *Ive*, pleaded, as to *Bagot*, that he was an alien born out of the king's allegiance; and as to *Swyrenden*, that he was never seised of the said office in such manner as that he could be disseised of it: on which last plea issue was joined. And as to the other plea, *Bagot* replied, protesting that his parents were *English* born, that *H.* 6., late king de facto et non de jure, by his letters patent under

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the great seal of *England*, granted to him by the name of *John Bagot*, a native of his duchy of Normandy, that he and his heirs should be indegeni et legei, and *should sue* as such in all actions, real, personal, and mixed, &c. The defendant *Ive* rejoined by setting forth an act of parliament made in the 1 *Ed.* 4., asserting the king's title, and declaring the usurpation of the kings *Henry* 4th., 5th., 6th., by which all acts done by them were annulled. To this *Bagot* demurred, and a day was given, but *Swyrenden* died before, by which the writ abated. *Bagot* then brought another assize, and the same pleadings were had, and a verdict passed for *Bagot*, who afterwards prayed judgment; and upon argument on other points in arrest of judgment, *Bagot* had judgment to recover the office. The result of the whole case seems to be that the let-

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ters patent of denization granted by the late king de facto were deemed available to enable *Bagot* to sue for the office which had been granted to him; but that without the special words of grant enabling him to sue, the mere grant of the office, which alone was relied upon in the first stage of the pleadings, would not have worked that effect; but that the grant of the office would only have enabled the plaintiff as an alien to take it for the benefit of the crown, but not to sue for the profits of it for himself. This proceeds upon the rule of law, that nothing is to be presumed from the king's grant in favour of the grantee but what the king himself had expressed. If therefore the licence in question had been granted to a *Russian* subject by name to ship a cargo from this country, the Court could not imply from thence that the king meant further to grant him a licence to insure that cargo, and still less a licence to sue upon any such contract: if such further licences had been intended, they would have been inserted in the letter; or if omitted [488] by accident in the original licence, the king would have granted them afterwards. If a special licence of this description may be thus extended by implication, within what period of time may an action be brought to enforce these subsequent collateral contracts? Varying circumstances may in the mean time have changed the policy of the state in respect to such indulgencies. [Lord *Ellenborough*, C. J. I am afraid, if this argument be pushed so far, that the licence will not only not operate to a double intent, but will not even go the full length of a single intent, if the licensee himself may neither sue for, nor insure the cargo which he is licensed to export.] The licence will still operate to protect his property from seizure jure belli, by force of the king's prerogative; and if seised, it would be released by the Court of Admiralty. The argument however against this licence goes farther; for in order to support it, it must not only be shewn that a grant to a *Russian* enemy to export a cargo would impliedly authorize him to insure it, and to sue upon it during the war, but that the granting such a licence to *Pedder*, for himself *and others*, would enable *Pedder*, a subject of the king, to transfer these powers to an alien enemy. But if the king had intended to grant *Pedder* such powers of delegation, his grant would be void. It is the same thing whether an action be brought by an alien enemy for his benefit, according to *Brandon* v. *Nesbitt* (*a*) and *Bristow* v. *Towers* (*b*).

As to the second question, it has long been settled that an assured cannot recover for a loss occasioned by his own act; and in *Conway* v. *Gray* (*c*), it was held, upon much consideration, and

(*a*) 6 *Term Rep.* 23. (*b*) *Ib.* 135. (*c*) 10 *East*, 536.

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on sound principles of policy, that every subject should be taken to be a party to the acts of his own government, and if the loss were occasioned by the act of such his government, the assured should not recover. This rule was not intended to be broken in upon by the case of *Usparicha* v. *Noble* (*a*), though there were some expressions used in that case, which by themselves might seem to go that length; but they may be explained with reference to the circumstances of that case, which was a special licence granted to subjects of *Spain* for a particular adventure. As to the argument, that the very fact of a *Russian* subject obtaining a *British* licence to carry on trade with a *British* subject in time of war, evinced an intention on his part to separate himself from his own government in their hostility; that can only be founded upon the supposition, that, by obtaining a trading licence from an enemy, he meant to act contrary to his own government. But that depends upon the law of *Russia*, and is not to be assumed as a fact, without evidence. *Bynkershoek* indeed says that the very declaration of war prohibits commerce between the belligerents; but that is stated as fact, and not as the law of nations. [Lord *Ellenborough*, C. J. asked if there were any country where that was not the law.] It has been otherwise practised in *Holland*. [Lord *Ellenborough*, C. J. That was a particular case, and not the general law of the country.] It has been often attempted by different countries to leave commerce at peace, while nations were at war. But at all events it is a fact to be found, and not to be assumed. If an action were pending here between the subjects of two other countries upon a contract made pending hostilities between their governments, but while at peace with our own, the plaintiff in such an action would not be nonsuited, as having declared upon a contract illegal by the law of nations. But even if it were otherwise, why may not the *Russian* have had a licence from his own government to legalize his trading; a presumption more fit to be made, than that he has separated himself from it. No man is to be presumed to be criminal without proof. But admitting the legality of the trading under the licence, that does not imply a further liberty to insure, and also to sue on the contract of insurance. The argument may with as much reason be pushed to all its consequences; and then it might also be inferred, that after receiving the gold and silver money of the realm in execution, the foreigner would be at liberty to carry it away with him. [Lord *Ellenborough*, C. J. The argument could only be carried as far as the doctrine in *Wells* v. *Williams* (*b*) would carry it: where

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(*a*) 13 *East*, 332. (*b*) 1 *Ld. Raym.* 282. 1 *Salk.* 46.

to a plea of alien enemy, the plaintiff replied that at the time of making the bond upon which he sued, he was and yet is here by the licence and under the protection of the king. There it was admitted that an alien, who comes here under a safe conduct, may maintain an action, as a consequence of the leave given him to remain here in the time of war. [*Bayley*, J. He is put in the same condition as a subject in that respect; and there is no necessity for his exporting the coin: he may purchase foreign bills of exchange. Lord *Ellenborough*, C. J. The licence to the grantee legitimates the adventure out and home, and there is no occasion to inquire further in this case.] Supposing the licence or an act of parliament had given power to all the king's subjects to trade with *Russia* during the war, would that have enabled a *Russian* subject [491] to sue upon a contract made abroad with one of the king's subjects? and would it not have been answered by the court, as on other occasions, that if the legislature had so meant they would have said it? [Lord *Ellenborough*, C. J. We have recently held in *Fenton* v. *Pearson* (*a*), that a licence to a subject to purchase goods in *Russia* gave the *Russian* vendor a right to stop his goods in transitu.] That went to take away the right of action of the bankrupt vendee's assignees, and not to give the *Russian* enemy a right to sue. Besides, an alien enemy was not to be plundered of his property by any subject, without authority from the crown to seize it, and he might therefore defend his possession in a court of justice.

Barnewall in reply. There is no question but that the king may licence an alien enemy residing here to sue. *Wells* v. *Williams* is in point: in addition to which *Kensington* v. *Inglis*, in error (*b*), shews that where a certain trading with an enemy was licensed for goods to be imported in his ship, that was held impliedly to license an insurance of the enemy's ship, upon which his agent here who effected the insurance might sue on his behalf. In truth a licence to an enemy to trade, which can only be executed by the medium of contracts, must be inoperative if it do not also carry with it a licence to sue upon such contracts. And here the question is not whether such a power may be delegated by the licensees to others: for the licence in its terms is a general one to certain persons named, *and others* who are not named. [Lord *Ellenborough*, [492] C. J. Should not the crown appear by the licence to have had sufficient notice of the object of it: so that where it appears to have been taken out by *British* subjects, it shall not afterwards be

(*a*) *Ante*, 419. (*b*) 8 *East*, 273.

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transferred to alien enemies, whom it does not appear that the crown had in its contemplation at the time of granting it.] The crown contemplated a trading to *any* port in the *Baltic*, most of which it must have known were hostile at the time. [Lord *Ellenborough*, C. J. *Sweden* was then neutral.] *All* were meant to be included; otherwise the licence would have been restrained to a trading to all *neutral* ports: it was a licence for *the trade* to the *Baltic*, to evade the prohibitions of the hostile governments.

Lord ELLENBOROUGH, C. J. Two points have been made, both of which have been at different times the subjects of serious consideration to all the court. I have frequently had them brought in discussion before me at nisi prius, and have intimated to different judges the results of those cases. And without saying whether I may not, after hearing the opinions of all my brothers, and upon further discussion, and further lights upon the subject, vary the opinion which I now entertain; yet that no inconvenience may ensue from reserving our judgment upon a question involving so large a mass of property as this does, I shall proceed to deliver my present opinion. The first point arises upon the means of the licence, which is to *Pedder*, *Bluhm*, and *Simon*, on behalf of themselves *and others*, which persons so named, and on whose application the licence was granted, must, there being
[493] nothing appearing to the contrary, have been contemplated to be *British* subjects residing here, or at least persons residing here, and owing a temporary allegiance to the king at the time; and the question is whether such a licence can enure to the benefit of a *Russian* alien enemy residing in the enemy's country. I do not mean to impose the same strictness of construction upon a licence of this description as was formerly applied to the king's grants; but at least it ought to be construed according to the fair sense and meaning of the words used; and when in an extended sense of those words, the construction may be of injurious tendency to the public interest, we ought not to attribute to the crown an intention to use the words in that sense, without more certain indication of its having contemplated this use of its licence. The king by his prerogative has a power of dispensing peace and war, and he may by his licence dispense with the penalties arising out of a state of war in favour of an individual; and since by act of parliament the same discretionary power has been confided to the secretary of state, which was before exercised by the king, the same interpretation ought to be put on a licence so granted. The question then is whether a licence, if granted here under the sign manual to *Pedder*, *Bluhm*, and *Simon*, (who must be taken to be

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British subjects,) *and others,* would not be restrained to the particular licensees, and to others ejusdem generis ; and might there not be good reasons for granting it to some individuals and withholding it from others. I assume for this purpose, that as the licence was to export the goods to *any* port in the *Baltic*) the *Baltic* including at that time a large proportion of hostile ports) it meant to include all, hostile as well as friendly ; yet still the king might place special confidence in the persons named, that the licence would not be abused, which he might justly withhold from [494] an enemy. Many public inconveniencies might arise from permitting an indiscriminate intercourse to alien enemies between our own ports and those of the enemy, which might be with less hazard permitted to our own subjects; many collateral negotiations might be instituted injurious to the state in the one case, which could not be expected in the other. All, however, which I demand for the security of the state is that it should appear, by the terms of the licence, that where it is used to cover a trade by the subject of an enemy from this country to a hostile port, such an use of it should have been within the contemplation of the government issuing it; that the government should not be hoodwinked as to the real object of the parties obtaining it. Admitting, then, that the crown contemplated to license a trade to a hostile port; yet the object is very different, and it would be going much further to say that it contemplated a hostile grantee: the policy may be very different where such a licence is granted to a person residing here, who is known and accountable for any improper use of it; and where it is granted to an alien enemy residing in the heart of the enemy's country: whether, if used by thers than the immediate grantees, t should be used merely by such as are associated with those to whom it is granted; or whether it may be transferred to enemies, perhaps to *Frenchmen* themselves living in *France,* and under the personal control of our great enemy. Without binding myself therefore to a strict construction of the very terms of the licence, I must be satisfied, which I am not at present, of the intention of the crown, before I can agree to put the very extended construction now contended for upon the general words in this licence: and as at present ad- [495] vised, I think it cannot be extended to an enemy and to cover an enemy's property.

As to the second point, How far the *Russian* assured shall be said to have participated in the act of condemnation by his own country ; I have no difficulty in saying, that I think the subject of every country must be taken to participate in the public acts of

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his government. And this, upon the principle laid down in *Conway* v. *Gray*, exactly so far as it is not broken in upon by the case of *Usparicha* v. *Noble*, if indeed the former be at all broken in upon, in principle, by the latter, in which there appeared to be as express intention of the crown to legitimate the particular adventure with the *Spaniards* through the agency of a native *Spaniard* domiciled here. But if the principle of those cases be irreconcileable, and I was now obliged to adopt the one and relinquish the other, I should rather abide by the sound principle of *Conway* v. *Gray* than by the latitude of expression to be found in *Usparicha* v. *Noble*. The loss, therefore, in this case having been occasioned by a *Russian* condemnation, must conclude every *Russian* subject, and the *Russian* assured, for whose benefit this action is brought, cannot recover upon either ground of objection.

GROSE, J. declared himself of the same opinion upon both points.

LE BLANC, J. This action is brought by *British* agents, who, having made the contract of insurance in their own names for the foreign alien enemy, were competent to bring it, in point of legal capacity to sue upon the policy, against the defendant, who underwrote the goods against the risks mentioned, at and from *London* to
[496] ports or places in the *Baltic;* and these goods were shipped under a licence to *Pedder, Bluhm,* and *Simon,* on behalf of themselves *and others,* to load and export them on board the *Elizabeth,* bearing any flag except the *French,* from *London* to *any* port in the *Baltic.* The first question arises on the terms of the licence; and I cannot agree to apply the strict construction called for at the bar to instruments of this description, or that the same rules of construction apply to them as to the king's grants in former times of the revenues of the crown: but the true question for the court to consider is what was the intention of the crown in granting this licence? First, whether it authorizes a trading to the enemy's port; for if it do not, there is an end of the question. But I think that the licence to *Pedder, Bluhm,* and *Simon, and others,* to export a cargo of goods from *London* to *any* port in the *Baltic,* considering the state of the *Baltic* powers at that time, many if not most of which were then hostile, did authorize a trading to an enemy's port. And if so, it is secondly to be considered, whether it authorizes *Pedder* and company to carry on that trade in such a manner as would vest the property of the goods to be exported in the *Russian* alien enemy at the time of the shipment here. Now the general object of such licences was to facilitate the export of *British* manufactures or *British* colonial produce to the countries of the enemies, notwith-

standing the prohibition of their several governments: and if that were the object of this licence, I see little difference whether the goods were to be shipped here at the risk of the *Russian* or of the *British* subject, or were only to become the property of the *Russian* after their arrival in his own country: for whether the goods were originally shipped at the risk of the *Russian* or *British* merchant, the [497] trade from this country would still be under the control of the *British* merchant or agent here; and that circumstance does not seem to make any difference in the question as to the policy of the trade. The application for the licence to export a cargo from this country is always made by the *British* merchant here; and if any improper use were made of it when obtained, he would be answerable for it to the crown. If therefore it were deemed politic to carry on an export trade from this country to *any* port in the *Baltic*, at a time when most of the ports there were hostile, it does not appear to me that there is any difference whether the goods were *Russian* or *British* property at the time of exportation; because ultimately the crown in granting such a licence, must have contemplated that the goods were to become *Russian;* for they could only be delivered to the *Russian* in consequence of the previous contract or order: and therefore it appears to me that such a licence must necessarily extend to legalize the trading to *Russia*, whether or not the interest was in the *Russian* at the time of the shipment. And it must be remembered that this action is brought upon a policy of insurance on goods bound to a *Russian* port, and where the plaintiffs in the action, who sue upon the contract, are *British* subjects. I do not feel that any sound policy of the country can be prejudiced by so construing the licence granted in this case; but I give this opinion with great difficulty when I find that I differ in opinion from My Lord, who has had so much experience in questions of this nature at the sittings at nisi prius.

The second question arising in this case is whether the plaintiffs can recover for the benefit of the *Russian* subject for a loss which [498] has happened by the act of the *Russian* government: and acceding, as I do, to the general rule laid down in *Conway* v. *Gray* (*a*), which was founded on *Touteng* v. *Hubbard* (*b*), I should have considered that the party interested, being a subject of the *Russian* government, would not be protected against a loss by the act of his own government. But that still brings it to the question, whether he is taken out of the general rule by the licence granted in this case, according to the construction adopted in *Usparicha* v. *Noble* (*c*). In that case

(*a*) 10 *East*, 536. (*b*) 3 *Bos. & Pull.* 291. (*c*) 13 *East*, 332.

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the licence to trade to certain *Spanish* ports then hostile was granted to a *Spaniard* domiciled here; and therefore I do not lay any stress on the person to whom it was granted; but considering it as having been granted to any indifferent subject of the king residing here, yet inasmuch as it was deemed to legalize the trade to the ports of the enemy, it was held to cover the property of other *Spaniards* residing in *Spain*. Now here it is the same as if the licence had been to export the goods to *Petersburgh* by name, being to *any* port in the *Baltic;* and the only difference in the two cases is that in *Uspariclia* v. *Noble* the condemnation was by a *French* consular court sitting in *Spain*, and not, as in this case, by a proper national court. The principal, however, which the Court there adopted was that in authorizing the trade to an enemy's port, the licence impliedly legalized the contract of insurance upon the enemy's goods exported from hence under that licence: the same principle I think will govern the present case.

BAYLEY, J. Upon the best consideration which I can give this
[499] case, I think that the plaintiffs are not entitled to recover, and that a nonsuit ought to be entered. Two questions have been made: one upon the construction of the licence; in deciding which we ought to consider what was the intention of the crown at the time it was granted, as it may be collected from the licence itself: for it should appear that the king was put in possession at the time of all the circumstances and objects to which it was to be applied. It is now contended that this licence authorizes a *Russian*, the subject of a state at war with this country, to export from hence goods of his own into his own country: but looking at the licence itself, I see nothing in it to shew that it was in the contemplation of the crown to cover the importation of *Russian* property into that country from hence: on the contrary the licence is to *Pedder*, *Bluhm*, and *Simon*, (who are *British* subjects residing here,) and *others*, (which must be taken to mean others of the same description,) to export goods from this country to any port in the *Baltic;* from whence I conclude that the crown looked only to licence an exportation by *British* subjects. It may make a great difference whether the destination of the goods is to be under the control of a *British* subject, or an alien enemy; whether to a friendly or to a hostile port in the *Baltic;* and that destination is not fairly brought under the notice of the government in the terms of this licence, when it is attempted to be appointed to legalize not an exportation by the subjects of the king, but an importation by an alien enemy into his own country. I cannot say that such a case was certainly contemplated at the time of granting the licence.

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Upon the other point, I quite agree with the doctrine laid down in *Conway* v. *Gray*, and that class of cases: *and if there be any expression in the judgment of the Court in the case of *Usparicha* v. *Noble* which disagrees with that doctrine, I have no difficulty in saying that I should abide by the former in preference to the latter decision. It is a clear principle that every subject is bound by the acts of his own state. But in *Usparicha* v. *Noble* there was no previous act of the *Spanish* government which was conducive to the loss: the capture was by a *French* privateer. It was indeed a licence to a *Spaniard* and not to a native subject; but that *Spaniard* was domiciled here; and it was not a licence to send goods to *any* port, which might be intended for a neutral as well as for a hostile port; but it licensed the exportation directly to two certain ports in *Spain*, which was then hostile to this country. It was argued as if property in that case had been condemned by the *Spanish* government; but that I deny: for there was no one act of the *Spanish* government after the capture which contributed to the loss. The circumstances of that case, therefore, were very different from the present. The licence was direct to export to the enemy's ports; there was war existing both with *France* and with *Spain* before the policy was effected; the capture was made by a *French* privateer, and the condemnation was by a *French* consular court sitting in *Spain*. Whereas here, after the policy was made, there was a new authoritative act of the *Russian* government, which had made the seizure, warranting the condemnation which induced the loss. This distinguishes the present case from *Usparicha* v. *Noble*, and ranges it as I think with that of *Conway* v. *Gray*. But as this opinion differs from one of my learned Brothers, I am glad that the question will not be concluded by the judgment of nonsuit.

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The Court allowed, if the parties could agree to turn this case into a special verdict, that judgment should be entered for the defendant; otherwise a judgment of nonsuit was to be entered, according to the liberty reserved at the trial: but the parties afterwards agreed to turn the case into a special verdict, on which judgment was entered for the defendant.

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THOMPSON, one, &c. *against* NOEL.

Friday, May 1st.

THIS was an action on the case, in which the plaintiff declared, that whereas at the times after mentioned he used and exer-

No action lies as for a disturbance of a solicitor retained at a public meeting to solicit a bill in parliament; there being no wrongful act by the defendant stated: but only that the defendant, who was the chairman of the meeting and one of the committee appointed for the despatch of the business, conspired with others to disturb the plaintiff in his said employment and business, and procured other solicitors to be employed.

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cised the profession and business of a solicitor, and that at a meeting of gentlemen, merchants, &c. of the counties of *Lincoln* and *Rutland*, convened by public advertisement at *Stamford* on the 5th of *September* 1809, the defendant being then and there in the chair, it was resolved to promote a navigation from *Boston* and *Lynn* to *Stamford*, &c. and certain persons were then appointed as a committee for this purpose, of whom the defendant was one, and of which *committee* five or more were declared a competent number *for the dispatch of business;* and that the proper notices should be given of the intended application to parliament in the next session, for leave to bring in a bill for this purpose, &c., and that a subscription should be opened accordingly, &c.; *and that the plaintiff should be the solicitor for the purpose of conducting the bill in its progress through parliament, and for transacting the general business connected with the objects of that meeting.* That the plaintiff *accepted of the said employment* and business of such solicitor, and then and
[502] there became and was, and continually from thenceforth until the exhibiting of his bill, continued such solicitor as aforesaid: and that the defendant, intending to injure and prejudice him in this behalf *and to disturb him in his said employment and business as such solicitor,* and to prevent and hinder him from so conducting the said bill in its said progress, and from transacting great parts of the said general business connected with the objects of the said meeting, which he of right ought to, and otherwise would and might have done, and to deprive him of great profits which would otherwise have accrued to him from such his employment and business, afterwards and whilst the plaintiff was such solicitor, &c. unlawfully, wrongfully, and maliciously *combined, conspired, and confederated* with divers others, *to disturb the plaintiff* in his said employment and business as such solicitor, and to prevent him from so conducting the said bill in its progress, and from transacting divers great parts of the same general business which he might and would otherwise have done; and did together with others afterwards, and whilst the plaintiff was such solicitor, &c. in pursuance of the said unlawful combination, conspiracy, and confederacy, wrongfully and injuriously greatly disturb the plaintiff in his said employment and business as such solicitor, and prevent and hinder him from so conducting the said bill in its said progress, and from transacting the said parts of the said general business, and did cause and procure *C. L.* &c. to be employed, and they were by reason of such procurement at those times actually employed as solicitors in and about the conducting of the said bill &c., and actually did then and there conduct the said bill in its said progress, &c. and receive the profits

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thereof, &c.: by reason whereof* the plaintiff was greatly disturbed in his said employment and business, as such solicitor, and wholly lost and was deprived of great profits, &c. which would otherwise have accrued to him from his said employment, &c. There were various other counts laying the case in different ways: amongst others, the 7th count stated that whereas the plaintiff on the 1st of *January* 1810, and continually from thenceforth until the exhibiting of his bill, was the solicitor of, and as such solicitor *retained* and employed by divers, to wit, 5000 persons for the purpose of conducting a certain bill in its progress through parliament for the said last-mentioned persons, and for transacting certain general business for the same persons: yet the defendant, intending to disturb him in his said employment, &c. unlawfully combined, &c.: and so it continued and concluded like the former count. The defendant demurred generally to the whole declaration.

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The Court called upon the plaintiff's counsel to support his declaration, in which Lord *Ellenborough*, C. J. observed, that there was no tortuous act whatever of disturbance stated; but merely that certain persons, having employed an attorney, afterwards ceased to employ him and employed others.

Bayley, for the plaintiff, said that the defendant acted without authority in dismissing the solicitor retained at the general meeting of the parties interested in soliciting the bill. That an action lay by any person who was wrongfully disturbed by another in his property or occupation; and in 1. *Com. Dig.* tit, "Action on the Case for a Disturbance," B. 1. p. 217., it is laid down to be "sufficient to allege a disturbance generally, without shewing the particular manner of the disturbance:" for which is cited *Dawney* v. *Dee* (*a*), and *Bridg.* 4. and he referred also to a precedent in *New Book of Entries*, p. 8. But

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Lord ELLENBOROUGH. C. J. observed that those were cases of local disturbance and exclusion of the entry of the plaintiff into a place where he stated his right to enter: but for any thing which is stated in this declaration, the defendant might have done no more than make a noise in the plaintiff's hearing which disturbed his mind. That if the plaintiff had really been disturbed in a manner which was actionable, the Court would give him leave to amend his declaration; but if the only disturbance he could state was that the defendant and others, to whom the conduct of the

(*a*) *Cro. Jac.* 606. This was an action on the case for disturbing the plaintiff in the use of his pew in right of an ancient messuage.

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business was confided, had preferred others to solicit the bill instead of himself, it would not be worth while to amend.

Bayley said that he could not make the case better by any amendment; and thereupon the Court gave

Judgment for the defendant.

D. Pollock for the defendant.

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Tuesday, April 21st.

PITMAN and Another *against* STEVENS, NEWTE, and Others.

These words in a will, "I give and bequeath all that I shall die possessed of, real and personal, of what nature and kind soever, after my just debts paid. I appoint *P.* my *residuary legatee* and executor;" followed by certain annuities and legacies; with a desire to his legatee and executor to let his sister be interred in his (the testator's) vault, and with a recommendation to him to be kind to another relation, and to do something handsome for him at his death, &c. shew the testator's intention to make *P.* the residuary legatee of his real estate in fee.

CHARLES FOULIS being seised in fee of a dwelling-house, wharf, warehouses, and other premises at *Blackwall*, in *Middlesex*, and of other real estates, by his will duly executed and attested, devised as follows: "I give and bequeath all that I shall "die possessed of, real and personal, of what nature and kind "soever, after my just debts are paid. I do hereby appoint Cap- "tain *Robert Preston* my residuary legatee and executor. I be- "queath to *George Foulis Pitcairn*, my sister's son, twenty guineas "a-year, to be paid quarterly: the reason I leave him so little, "he being very bad in mind. I give and bequeath to Captain "*W. D. G.* 30*l.* for mourning, he having behaved not to my "satisfaction, marrying into the family I disliked: and to his "mother, if alive at my decease, 100*l.* for mourning; she "having lately married a third husband, and I do not know the "name she goes by, and quite against my approbation. Item, I "give to my dear sister *Margaret Freeman* 2000*l.*, to give her "two sons *Charles* and *Thomas Freeman* when she dies; and I "desire my legatee and executor to let her be interred in my "vault with her late husband *W. G. Freeman.* Item, I give to "the Reverend *J. Reily* 1000*l.* for his life; then to go in moie- "ties to his two children, *John* and *Martha Reily.* I recommend "to Captain *Preston*, my legatee and executor, to be kind and "friendly to my brother-in-law, *John Crichton;* and as he has had "the misfortune to lose his fortune, beg he will do something "handsome for him at his death, or when he shall want any [506] "thing to live on. Item, I give and bequeath to Mrs. *Ruther-* "*ford* 1000*l.* Item, I give unto *Jane Brown* 25*l.* per annum "during her natural life, and 20*l.* for mourning; and to each "servant that lives with me until I die, 10*l.* for mourning, and "to my cook, *Rebecca*, 30*l.* In witness," &c.

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The devisor died on the 9th of *July*, 1783, leaving Captain (since Sir *Robert*) *Preston*, Bart. him surviving. Upon the testator's decease Captain *Robert Preston* entered into the possession of the dwelling-house, wharf, warehouses, and other premises at *Blackwall*, and all the testator's other real estates. *Thomas Newte* deceased, after making his will, contracted with Sir *Robert Preston* for the purchase of the said premises at *Blackwall*, then in lease to Mr. *Newte*, and which premises were afterwards, by indentures of lease and release dated the 28th and 29th of *July* 1803, in consideration of 515*l.*, conveyed by Sir *Robert Preston* to Mr. *Newte* in fee. On the 6th of *July* 1808, the complainants filed their bill in Chancery against the defendants, to which bill the defendants put in their answers, &c.; and on the hearing of the cause before the Master of the Rolls, his Honor directed the case before stated to be made for the opinion of this Court, upon the question Whether Sir *Robert Preston*, Bart. took any and what estate under the will of *Charles Foulis* in the dwelling-house and other premises at *Blackwall*.

Holroyd, for the plaintiff, after adverting to the words of the will, describing the property which the testator intended to devise, as sufficient to pass the realty, (of which the Court had no doubt,) contended that the obvious meaning of the whole will [507] was that Captain *Preston*, whom he named his residuary legatee and executor, should take all the real as well as personal property of the testator, subject to the payment of the annuities and legacies. The testator assigns a reason why he only gives his sister's son 20 guineas a year; and gives other near relations large specific legacies; and recommends to his legatee and executor, that is, Captain *Preston*, when his sister *Margaret* dies, to let her be interred in his (the testator's) vault; and also recommends to him to be kind and friendly to his brother-in-law *John Crichton*, who had lost his fortune: this must mean that Captain *Preston* was to evince that kindness out of the real and personal property which the testator died possessed of, as described in the beginning of the will, and of which the testator had appointed him residuary legatee and executor. If he do not take the realty, it is given to no person; and if he do take it, he must take the fee. To shew that the words *legacy* and *personalty* might be applied to real estate, he cited *Hope* v. *Taylor*, (*a*) *Hardacre* v. *Nash* (*b*), and *Doe* v. *Tofield* (*c*).

Bowen, contrà, contended that Captain *Preston* did not take the

(*a*) 1 *Burr.* 268. (*b*) 5 *Term Rep.* 716. (*c*) 11 *East*, 246.

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realty at all; or, if he did, that he only took it for life, there being no words of inheritance. The first words of the will are merely introductory, and as such passed nothing, according to *Ibbetson* v. *Beckwith* (*a*), *Denn* v. *Gaskin* (*b*), and *Doe* v. *Allen* (*c*). Then there is no gift of realty to any person either in form or sub-

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stance; but as Lord *Hardwicke*, C. said, in *Grayson* v. *Atkinson* (*d*), concerning introductory words denoting the testator's intention to dispose of "all his temporal estate,"—"Intention at first is one thing, and the execution of that intention is another." The argument then for giving the fee in the realty to Captain *Preston* rests upon his appointment to be *executor* and residuary *legatee;* but the word *legacy* has never been applied to realty except in the cases mentioned, where it was used with words of reference to more apt words of devise of the realty; and the word *executor* is peculiarly appropriate to the bequest or distribution of personal property only; of which description were all the legacies given by the testator; and therefore those words will be satisfied by Captain *Preston*'s taking the residue of the personal property after the specific legacies are provided for. In *Shaw* v. *Bull* (*e*), it is said that making one executrix, and giving her the overplus of his estate, would only give her the personalty. So in *Clements* v. *Cassye* (*f*), where one made his wife executrix of all his goods and lands, it was held not to give her the fee; for it should only be intended of such lands as she might take as executrix. In *Piggott* v. *Penrice* (*g*), the testator devised thus: "I make my niece *G.* executrix of all my goods, *lands*, and chattels;" and it was held that though he had only lands of inheritance, they did not pass. How would it have altered the case if the appointment of Captain *Preston* as residuary legatee and executor, instead of immediately following the introductory clause, had come in at the conclusion, after the bequest of the specific legacies: and yet the cases cited

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shew that the land would not pass by such a disposition. That the juxta-position can make no difference; for it did not avail in *Denn* v. *Gaskin* (*h*), nor in *Right* v. *Sidebotham* (*i*). The heir cannot be disinherited unless the estate be given to another: and here all that is imposed upon or desired to be done by Captain *Preston* may be done by him in his character of the executor and residuary legatee of the personal estate. [Lord *Ellenborough*, C. J. How was he in that character to let the testator's sister be buried

(*a*) *Cas. temp. Talb.* 157. (*b*) *Cowp.* 657. 661. (*c*) 8 *Term Rep.* 503.
(*d*) 1 *Wils.* 333. (*e*) 12 *Mod.* 593. (*f*) *Noy*, 48.
(*g*) *Prec. in Chanc.* 471. *Eq. Cas.* 137. 3 *Com. Dig.* 22. *Devise N.* 3.
(*h*) *Cowp.* 657. (*i*) *Dougl.* 759.

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in the family vault?] The testator had no estate in the vault, the fee of which is in the rector: it is only a privilege. [Lord *Ellenborough*, C. J. He might have had it by a faculty annexing it to a messuage, or rather to the occupiers of the messuage, which would pass with the house, if undevised, to the heir. He calls it *his* vault.]

Holroyd, in reply to the argument that the *fee* would not pass, even if Captain *P.* took a life-estate in the realty, cited *Hogan* v. *Jackson* (*a*) as in point; where, after a devise of a house and land to his mother for life, and after giving several legacies and annuities to his relations, including his heir at law, the testator devised to his mother "all the remainder and residue of all his effects, both real and personal, which he should die possessed of;" and under this residuary clause, the mother was held to take a fee in all the real estate. He also relied for this purpose on the testator's recommendation to Captain *Preston* to be kind and friendly to his (the testator's) brother-in-law, and to do something handsome for him *at his death*, or when he should want any thing to live on.

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Lord ELLENBOROUGH, C. J. Little doubt can be made as to the meaning of the testator. In the construction of wills hardly any words are to be found of so stubborn and inflexible a meaning as not to bend to the plain sense of the context. Here the testator begins by giving and bequeathing "all that he shall die possessed of, *real* and personal, of what nature and kind soever, after his just debts paid." The stress of the argument for the defendant is that the person is not expressed to whom the testator has so given and bequeathed all his real and personal estate: but the words shew his intention to dispose of all he had (and the question, as to the realty, is as to nothing or all;) and they will assist in construing other words. Then he appoints Captain *Preston* his residuary legatee and executors: residuary legatee and executor of what? "of all that he should die possessed of, real and personal, of what nature and kind soever:" that is, all that he should not otherwise dispose of. The word *legatee*, according to the cases, particularly *Hardacre* v. *Nash*, may be applied to real estate, if the context require it, as was said by Lord *Kenyon* upon the word *legacy*. Then in the subsequent parts of the will, he contemplates that his residuary legatee and executor will have the disposition of his whole funds; for, after some legacies and annuities, he recommends him to be kind and friendly to his brother-in-law, and to do something handsome for him at his death. That shews the testator contemplated that Captain

(*a*) *Cowp.* 299. and 7 *Bro. P. C.* 467.

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Preston would have all his funds, real and personal, that he should die possessed of, (and not otherwise bequeathed,) out of which he was to do this. The appointment of Captain *Preston* to be his residuary legatee follows the gift of all he should die possessed of, real and personal; and there would be nothing to explain the word *all*, unless he was legatee in fee of the real as well as personal property.

We will certify our opinion to the Master of the Rolls.

The following certificate was afterwards sent to his Honor.—This case has been argued before us by counsel: We have considered it, and are of opinion that Sir *Robert Preston* took an estate in fee under the will of *Charles Foulis* in the messuage or dwelling-house and other premises at *Blackwall*, in the county of *Middlesex*, of which the said *Charles Foulis* was seised in fee at the time of making his will.

ELLENBOROUGH.
N. GROSE.
S. LE BLANC.
J. BAYLEY.

Friday, May 1st.

PRATT *against* HUTCHINSON.

There is no objection upon the stat. 6 *G.* 1. *c.* 18. *s.* 18, 19. as for a public nuisance and grievance, to articles of

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agreement, whereby 50 persons agreed to raise 200 shares at 210*l.* each, *by small monthly subscriptions*, for building houses for each other, every holder paying interest on his shares till paid up; with a stipulation for the members *to employ certain tradesmen only* in the building; with power to each member *to sell his shares and transfer them* in the books of the society, *provided that the purchaser should be approved* at a meeting of the society, *and* should, on his admission, *become a party to the original articles:* for there is nothing illegal per se in the general object, or in the mode of executing it; nor is such limited power of transferring the shares a raising of transferable stock within the mischief of the act.

IN debt on bond, dated the 7th of *December* 1809, whereby the defendant bound himself in the penal sum of 420*l.* to the plaintiff, *as treasurer of the society called the* Greenwich *Union Building Society*, the declaration stated the condition of the bond; reciting that by a certain deed of rules and regulations, dated 7th *January* 1809, one *T. M.* and *I. K.* with divers others, had founded a society called the *Greenwich* Union Building Society, to raise by monthly subscriptions a fund or capital to be laid out in building houses, and to divide the same between them, under and subject to the rules and regulations thereinafter expressed; and that is was by the first article in the said deed declared that the society should consist of no more than 50 members, holding in the whole not more than 200 shares of 210*l.* each; and that by the 5th article the members should draw lots from time to time, as often as the funds of the society amounted to 100*l.* clear; and by the 8th, 9th, 10th, and 11th articles every share should consist of a dwelling-house of

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the best materials, to be completed in a workmanlike manner, and should be begun by the bricklayer and carpenter thereinafter named within one week after every notice for that purpose, and should be roofed in within three weeks, and completed within six months after such notice; in default of which the bricklayer, carpenter, or any other tradesman, should forfeit for his neglect 5*l.* per cent. upon their respective bills. Then followed clauses, that no money should be advanced to any tradesman till the house ordered should be completed to the satisfaction of the society's surveyor, and then the treasurer should have an order from the society to pay the several bills: and that from the time such house should be finished, the member owning the same should pay to the society 5*l.* per cent. per annum on the 210*l.* share so drawn and advanced, *until the final close of the society by each member having paid his* 210*l. on each share held by him.* And that every member who should have built his house previous to his having a prize or share, which he should be permitted to do, should, whenever he should be the successful [513] drawer, be paid 210*l.* for every share he should hold, provided he employed the tradesmen to build the same appointed by the society, and not otherwise: and in case the said tradesmen should not have been paid by such member, they should be paid by the treasurer, &c. in the first place, and the surplus only, if any, of the said 210*l.* paid to such member. By article 13, each person, on having the 210*l.* advanced on each share, should deposit his title deeds or other good security, to the satisfaction of the society, in the treasurer's hands till the final close of the society. And further reciting that *T. Mumford* and *J. Skeen* had become entitled to one share, and entitled as such to the advance from the society of 210*l.* on depositing their title deeds or giving good security as aforesaid, and that the society had agreed to accept the joint and several bond of them, and of the defendant and one *H. Caslin* as their sureties, for the money advanced to them, and for all future payments to them by the rules of the society, and also for the due performance by them of the said rules; and that the plaintiff, as treasurer, had paid to *Mumford* and *Caslin* 210*l.* on one share; the condition of the bond was that if *Mumford* and *Skeen* should pay to the treasurer, for the use of the society, interest on the said 210*l.* so advanced to them, at the rate of 5*l.* per cent., and also the monthly subscription of two guineas upon their said share, until the final close and determination of the said society; and also keep all the rules, &c.; then the bond to be void. The declaration then alleged several breaches in non-payment of the interest and monthly subscriptions for a certain time.

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The defendant pleaded that after making of the act of the 6 *Geo.* 1. (*c.* 18.), the said society was founded for raising a joint stock by small monthly subscriptions, and making transferrable shares of the same. And that by the 3d article of the deed of rules, &c. it was declared that the members should meet on the first *Thursday* in every month, &c., when the books should continue open for two hours, and each member should pay two guineas on every share held by him until 210*l.* should be paid for each share; such payments to be made to the treasurer, &c.: and by the 4th article, any member neglecting to make his payment at such meeting should forfeit 2*s.* 6*d.*; and if such arrears and forfeiture were not paid at the next meeting then he should forfeit 5*s.*, and for a third like default 10*s.* 6*d.*; and if after notice he should still neglect to comply with the articles, he should be excluded, and the money advanced by him forfeited, unless he should provide a person within three month from his last default, who should be voted eligible to become a member by the society; in which case the member selling his share should forfeit 10*l.* per cent. upon his subscription for the benefit of the society, unless the default appeared to happen from the misfortune of the person so selling his share. And by the 30th article, every member should have *full power* at all times *to sell his shares* privately whenever and at what price he should think proper, and that the secretary should transfer the same in the transfer-book of the society, and that every transfer should be signed and witnessed by the secretary: *provided* that every purchaser becoming a member should *on his admission become a party to the articles,* and duly execute and observe the same; and that no person should be permitted to purchase any share *until he should have been first proposed and approved at a meeting of the said society,* by at least three-fourths of the members present. That by the 28th article it was declared, that certain tradesmen (named) should be employed by the society in their several capacities, *and no others.* And then the defendant averred that the society was not established either by act of parliament or charter, or other legal authority; and that the obligation declared on was void in law by force of the statute. To this there was a general demurrer.

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Marryatt was to have argued in support of the demurrer, but *the Court* thought it unnecessary to hear him.

Lord *Ellenborough,* C. J. called on the defendant's counsel to state upon what grounds it could be contended that the shares created by this agreement were transferrable stock within the

meaning of the stat. 6 *G.* 1. *c.* 18. (*s.* 18.) when the holder had not the power of transferring his share except upon certain conditions, namely, upon the purchaser being approved by the society, and becoming a party to the original articles?

Comyn, for the defendant, said that the plea had been put in before the decision of the Court in the case of *The King* v. *Webb and Others* (*a*) was known; and upon the opinions intimated in the former cases (*b*), which he submitted were not impugned in this respect by *Webb*'s case, in which the nuisance of that particular undertaking was expressly negatived by the special finding of the jury, [516] which stated that the company was originally instituted from laudable motives, and that it then was and still continued to be beneficial to the inhabitants at large of *Birmingham*, where it had been set on foot. [*Bayley*, J. The plea does not allege generally as a question for the jury that this society was prejudicial to the public at large; and, therefore, unless it be brought within the statute, it is no answer.] Taking it then not to be within the statute so far as the right of transfer of the shares is of a limited nature, it is still within it as a project for raising a large sum for building houses by small subscriptions; which is one of the very speculations mentioned in *Anderson's History of Commerce*, as one of the bubbles of the day which gave rise to the act of parliament. Then the stipulation in the articles, that certain persons only shall be employed in the building and not others, is in restraint of trade, and against the general policy of the law. [Lord *Ellenborough*, C. J. How can it be said to be in restraint in trade, to contract for the employment of particular tradesmen in whom the parties have a confidence?] It would not be illegal in individuals exercising their own judgment upon it; but persons cannot indiscriminately combine not to employ any other than certain persons. [Lord *Ellenborough*, C. J. The combination must be for some illegal object; but there is nothing illegal in stipulating to employ particular persons only in the building.] The clubbing together of numbers of persons with transferrable shares, even though limited, for the purpose of carrying on trade, was one of the very mischiefs intended to be prevented by the act: it is calculated to put down individual industry and competition, which is most advantageous for the public. If fifty persons may do this, why may not a thou- [517]

(*a*) 14 *East*, 406.

(*b*) *Dodd*'s case, 9 *East*, 518. *Buck* v. *Buck*, 2 *Campb. N. P. Cas.* 547. and *Rex* v. *Stratton and Others*, cited ibid. 549.

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sand? [*Bayley*, J. That would bring it to a question of fact for the consideration of the jury, whether the extent of the numbers engaged in such undertakings was not prejudicial in fact to the public. *Le Blanc*, J. When every member has paid his 210*l.* as I read it, the engagement is to close.]

ELLENBOROUGH, C. J. said that the Court were all clearly of opinion that there was no pretence for the objection made upon the statute by the defendant; and gave

Judgment for the Plaintiff.

Friday, May 1st.

INGHAM and Others *against* AGNEW.

An Admiralty licence, obtained under the convoy act 43 *G.* 3. *c.* 57. for a ship to sail without convoy; describing her as bound on a voyage to *Gibraltar*, when in fact she sailed from hence with instruc-
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tions to make the best of her way direct to *Palermo*, without touching at *Gibraltar*, unless ordered into the bay by any cruizers which she might meet in passing by it; is fraudulent and void, and will not legalize an insurance, by the charterer of such ship sailing without convoy, upon goods put on board, and insured from hence to *Palermo*, &c. with liberty to proceed to any ports to seek convoy, &c.; and therefore will not cover a loss which happened in the latter part of the voyage; though the ship did in fact go into *Gibraltar*, being compelled to it by stress of weather against the master's intentions, and though no convoy was to be procured there, nor licence to proceed without it.

THIS was an action upon a policy of insurance, subscribed by the defendant, for 200*l.*, on goods on board the ship *Ocean*, at and from *Hull* to *Palermo*, *Messina*, and *Malta*, all or either; with liberty to proceed to any ports or places to seek for, join, or exchange convoy, or for the purpose of discharging or taking in goods; with leave to carry letters of marque, and with liberty to chase, capture, man, and send into port any prize or prizes. The interest was alleged in the plaintiffs, and the loss to be averred by capture. The declaration also contained the usual money counts. At the trial at *Guildhall* before Lord *Ellenborough*, C. J. a verdict was found for the plaintiffs for 200*l.* subject to the opinion of the Court on the following case.

The plaintiffs having hired the ship *Ocean*, by charter-party, for a voyage to *Messina*, *Palermo*, or *Malta*, loaded a cargo of goods, in which they were duly interested, on board her at *Hull* for *Palermo*, procured the policy in question to be effected, and obtained a licence from the Admiralty, dated the 29th of *June* 1810, authorizing the ship, (which is therein described as bound on a voyage *to Gibraltar*, without mentioning any other port,) to sail from *Hull* to *Gibraltar* without convoy. The sailing instructions to the master for his voyage were given in the following letter: "*Hull*, 14th *July* 1810. Captain *Thomas Anbane*, on receipt of this you will immediately proceed with the *Ocean* under your command, from hence to *Spithead*, where you will make the necessary inquiries about the convoy. If you find there is one appointed for the *Mediterranean* on the point of sailing, you are to take advantage of

it; but as you are on no account to wait for it longer than the wind may continue favourable, you must not take instructions until it is actually under weigh, that you may be at full liberty to pursue your voyage singly, should the convoy not sail the moment the wind becomes fair. In that case you will make the best of your way direct to *Palermo*, without touching either at *Gibraltar* or any other port: if, however, in passing *Gibraltar*, you are ordered into the bay by any of the cruizers, in order to join convoy bound upwards, you must comply: but not otherwise; as your great object must be to get to *Palermo*, your port of destination, in as short a time as possible." The master, on the 18th of *July* in the same year, sailed from *Hull* with the said ship and cargo on the voyage [519] insured, having no goods on board for *Gibraltar*, but with clearances for *Gibraltar*, *Malta*, and *Messina*. When the ship arrived in the *Gut* of *Gibraltar*, the master was compelled by stress of weather to put into that port. Had the weather been favourable, he would not have done so, but would have proceeded direct to *Palermo*, agreeably to his instructions. The course of the voyage to *Palermo* and to *Gibraltar* is the same, until the vessel arrives in the *Gut* of *Gibraltar*. He arrived at *Gibraltar* on the 25th of *August*, and staid there ten days, during which time he made inquiry for convoy to sail from *Gibraltar* on the further prosecution of his voyage, and would have sailed with such convoy if any had been appointed; but there was not then any convoy appointed, nor any person at *Gibraltar* authorized to appoint convoys, or to grant licence to sail or depart without convoy. Convoys for *Sicily* and other places in the *Mediterranean* frequently sailed from *England*. On the 25th of *September* the ship sailed from *Gibraltar*, without convoy, on the further prosecution of her voyage, and during such voyage was captured by the enemy, whereby the ship and cargo became wholly lost. If the plaintiffs were entitled to recover, the verdict was to stand: if not, a nonsuit was to be entered.

Richardson, for the plaintiffs. The question is whether by this sailing from *Gibraltar*, without convoy, the voyage was rendered illegal, and the insurance avoided by the convoy act 43 *G.* 3. *c.* 57. The first section prohibits any ship from sailing from any port without convoy, and the fourth section avoids the insurance on a ship so sailing; provided (by *s.* 6.) that nothing in the act con- [520] tained by which ships are required not to sail without convoy "shall extend (inter alia) to any ship for which a licence shall be granted to sail or depart without convoy by the Admiralty, &c. or by such person as shall be duly authorized by them;" or (by *s.* 8.) "to any ship sailing or departing without convoy from any foreign

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port or place, &c. in case there shall not be any convoy appointed for such ships, nor any person at such foreign port or place duly authorized by the Admiralty, &c. to appoint convoys for such ships, or to grant licences to such ships to sail or depart without convoy." But though this ship comes within the letter of these exceptions, as having been licensed to go to *Gibraltar* without convoy, and not having been able to procure convoy or a licence to sail without convoy from thence; yet it will be contended that not having been licensed to go the whole voyage, but only to *Gibraltar*, she does not virtually come within any of the exceptions. The case of *Cohen* v. *Hinckley* (*a*) differs from this; for there the ship sailed with convoy appointed for and sailing upon a different voyage, though for part of the way in the same course: but here the vessel was licensed to proceed to *Gibraltar* whither she first went, without convoy. [*Bayley*, J. Did this vessel ever sail for *Gibraltar*? for if she were not bound in the first instance to that port, the licence was obtained upon a representation that was not true.] Admitting that she was not intended to go to *Gibraltar* if she could get on to her place of destination without it, yet that was but mere intention which, like an intention to deviate, not executed, will not avoid a policy; and before the time arrived for executing it, circumstances
[521] occurred which obliged her to go into *Gibraltar*? and thus the voyage was legally performed. There was a locus penitentiæ. [Lord *Ellenborough*, C. J. Does not the licence contemplate a vessel *bound* upon a voyage to *Gibraltar*? but here it was no object of the voyage to go to *Gibraltar* at all, unless she was forced to do it. *Bayley*, J. Her instructions were to make the best of her way direct to *Palermo*, without touching at *Gibraltar*.] Leave was given by the policy to go to *Gibraltar*. [Lord *Ellenborough*, C. J. How will that mend the licence? There was a suggestio falsi, upon which it was obtained.] The instructions were no contradiction of the licence: it was left open to the captain to go to *Gibraltar*, if necessary. [*Le Blanc*, J. In order to maintain this action you must go further and contend that a licence for part of a voyage without convoy will be sufficient to protect the whole intended voyage.] That is not contended for; but it is sufficient if the vessel bring herself within one or other of the exceptions, so as to cover the whole voyage. Suppose the captain had gotten a new convoy at *Gibraltar*, or another licence to proceed from thence without convoy.

Marryatt, contrà, who was stopped by the Court, said that the

(*a*) 1 *Taunt.* 249.

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Court of *C. B.* had determined this point in favour of the defendant, in last *Michaelmas* term, in a case of *Wainhouse* v. *Lloyd.*

Lord ELLENBOROUGH, C. J. If the crown be deceived at the time of the licence granted, it cannot be made good by what happens afterwards. The question is whether a licence for a ship to go to *Gibraltar* without convoy was good at the time when there existed no intention at all to go there. The crown might well have thought that the voyage was to terminate at *Gibraltar;* it might have dispensed with the waiting for convoy upon a supposition that the object of the voyage was to supply *Gibraltar* with necessaries; and now it appears that at the very time the parties obtaining that licence meditated a voyage up the *Mediterranean.* The voyage was therefore illegal, and the insurance void.

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The other Judges concurred; and *Bayley,* J. added that the original sailing of the vessel under such a licence was fraudulent; for she never did sail *for* Gibraltar.

Judgment of nonsuit.

FLINDT *against* CROKATT.

Friday, May 1st.

THIS was an action upon a policy of insurance, made on the 3d of *October* 1810, upon goods on board the ship *Heinrick,* at and from *London* to any port or ports in the *Baltic* sea and *Gulph* of *Finland,* backwards and forwards, against all risks; including the risk in craft, until safely warehoused in the warehouse of the consignee at the final port or place of discharge; with liberty to seek, join, and exchange convoys, and to carry and exchange real or simulated papers and clearances; with liberty also in that voyage to sail to, and touch, stay, discharge, and reload her cargo at any port in *Sweden,* and to wait for orders, and for any purposes whatsoever at or off any port or places she might touch at, &c. at a premium of 40 guineas per cent. to return 10*l.* per cent. for arrival, and 10*l.* per cent. more if the voyage ended at a *Swedish* port within the *Sound.* The interest was averred to be in persons trading under the firm of *Gerlick* and *Becker;* and the loss was averred to be by hostile capture by the king's enemies. It appeared in evidence at the trial before Lord *Ellenborough,* C. J. at *Guildhall,* that *Gerlick* and *Becker,* for whom the plaintiff, as their agent in *London,* caused the policy to be effected, were *Russian* subjects and alien enemies, residing at *St. Petersburgh* at the time; that the ship sailed with her cargo on the 12th of *October,* under the licence after stated, and was afterwards captured by a *French* privateer,

From a licence to *A.* and *B.* (who were in fact *British* merchants residing here) to export goods in a certain ship to *any* port in the *Baltic not blockaded,* and *to whomsoever the property might appear to belong,* the majority of the Court did not sufficiently collect the intention of the crown to cover the property of

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enemies shipped from hence to an enemy's port; some ports in the *Baltic* being neutral at the time, though most of them were hostile.

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and carried into a *Dutch* port. *Russia* and *Denmark* were during the whole time of this transaction at open war with this country, and *Sweden* was neutral. The plaintiff relied upon the following licence as legalizing the trade and insurance in question. The licence was, as usual, directed "to all commanders of his majesty's ships of war and privateers, and all others whom it may concern," and was granted by the secretary of state, by the authority of his majesty, by order of council, under the act of the 48 *Geo.* 3. *c.* 126. "to Messrs. *Castendrick* and *Hentz*, on behalf of themselves *and others;* thereby permitting them to load and to export on board the ship *Heinrick, Dieckleman*, master, of 80 tons, bearing any flag except the *French*, a cargo of *British* manufactures, &c. and such goods as are permitted by law to be exported, except hemp, from any port in this kingdom to *any* port in the *Baltic not blockaded;* with liberty to touch at any port in *Sweden* for orders, notwithstanding all the documents which accompany the ship and cargo may represent the same to be destined to any neutral or hostile port, *and to whomsoever such property may appear to belong*," &c. The licence was to remain in force four months from the date, which was some day in *September* 1810.

[524] A verdict was taken for the plaintiff, reserving the question of law; and a rule nisi was obtained by *Park* and *Carr*, in the last term, for setting the verdict aside and having a new trial, or entering a nonsuit. And upon shewing cause now, the case was argued for the plaintiff, the assured, by *The Attorney-General, Garrow*, and *Taddy*, upon the same general grounds as the former case of *Mennett* v. *Bonham;* the only distinctions between the two cases being, first, that in this, the capture was made by a *French* force, and the loss was not occasioned by a condemnation of the assured's own government, as in *Mennett* v. *Bonham;* which disposed of the objection founded on *Conway* v. *Gray* (*a*), and that class of cases: 2dly, That the licence permitted the goods to be exported from hence to *any* port in the *Baltic not blockaded;* which shewed, as it was argued, that the crown did contemplate an exportation to an enemy's port, as none other were usually the objects of blockade: and 3dly, That the licence provided in terms to cover the property, "*to whomsoever such property might appear to belong;*" which words were also relied on, as shewing that the crown contemplated that the property might belong to an enemy; and that these words were so understood in the Court of Admi-

(*a*) 10 *East*, 536.

ralty: for which they referred to the case of the *Cousine Marianne*, in *Edwards'* Collection of Cases on Licences, p. 21. 1812.

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The majority of the Court, however, still retaining the opinion they held in the former case, and thinking that these differences did not substantially do away the main ground of objection to the terms of the licence, on which they had decided that case; namely, that they could not satisfactorily collect from the general terms of the licence that it was the intention of the crown to cover enemies' property by it; and which doctrine seemed to have been supported by the judgment of the Court of Appeal in the case of the *Josephine* (1 *Acton's Rep.* 313.); and which was again brought to the notice of the same Court in the case of the *Hendrick*, (*ibid.* 326.) made the rule absolute. But on a subsequent day (*a*) the *Attorney-General* communicated to them, that the parties had agreed to turn the facts of the case into a special verdict, with judgment thereon for the defendant: in order that the plaintiff might take the opinion of a Court of Error: to which the Court readily assented, and it was ordered accordingly (*b*).

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(*a*) *Monday, May 11th.* (*b*) See the next case.

FLINDT *against* SCOTT.

Saturday, May 2d.

THIS also was an action on a policy of insurance by the plaintiff as agent for a *Russian* house of trade, as in the last case; and the policy was effected on the 19th of *April* 1810, under the same general circumstances as are there mentioned: but here the policy was on goods on board the ship *Kranick*, "at and from *London to Archangel, and until safely warehoused in the warehouses of the consignee, against all risks;* with liberty to carry *simulated papers*," &c.; the interest being averred to be in persons in trade using the firm of *Dackbecker, Klain*, and Co., who in fact were proved to be *Russian* subjects and alien enemies, residing at *Riga*, during the whole of the transaction. And here the loss was averred to be, "that *after the arrival of the ship with her cargo at her port of destination*, and before the said goods were safely warehoused in the warehouses of the consignee, the said goods were, with force and arms, and in *a*

Whether or not a licence under the st. 48 *G.* 3. c. 126. to *G. F.* of *London*, merchants, on behalf of themselves *and others*, to export on board a certain vessel bearing any flag

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except the *French*, a cargo of *British* manufactures and colonial produce from *London* to *Archangel*, and to import from thence a cargo

on board the said ship of such goods as may lawfully be imported, would warrant an exportation of the goods licensed by a *Russian* purchaser here; *Russia* being then hostile; at all events, if such *Russian* owner and alien enemy insure the goods on the voyage from *London* to *Archangel*, and they be seized and condemned by his own government upon their arrival, he cannot recover, by the opinion of a majority of the Court.

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hostile manner, seized, detained, and carried away by certain persons, enemies of our lord the king, and were wholly lost to the proprietors thereof:" and in fact the hostile seizure was proved to have been made by the *Russian* government (then at war with this country) itself, within a few days after the arrival of the ship, on the 13th of *July:* and the cargo was condemned for the use of the *Russian* emperor, on the ground in effect of having simulated papers to carry the appearance of a neutral cargo. But the assured relied upon a licence obtained on the 3d of *April* 1810 by the plaintiff, acting as their agent and on their behalf: which licence was granted by the secretary of state, under his majesty's order in council, by virtue of the act of the 48 *G.* 3. *c.* 126, "to *G. Flindt* and Co., (the plaintiff's trading name,) *of London, merchants,* on behalf of themselves *and others,* thereby permitting them to load and export on board the vessel *Kranick, Becker* master, bearing any flag, except the *French,* a cargo of *British* manufactures and colonial produce, &c. *from London to Archangel,* and to import from thence on board the said ship a cargo of such goods as are by law permitted to be imported (except, &c.) to any port of the united kingdom; the master to be permitted to receive his freight and depart with his crew and vessel to any port not blockaded, notwithstanding all the documents which accompany the ship and
[527] cargo may represent the same to be destined to any neutral or hostile port, and to whomsoever such property may appear to belong," &c. This licence was directed, as usual, "To all commanders of his majesty's ships of war and privateers, and all others whom it may concern;" and the goods in question exported were such as were authorized to be so by the terms of it. It appeared in the conclusion of the sentence of condemnation by the *Russian* court, that the ship, being proved to be neutral, was released and had liberty to depart with a cargo of *Russian* produce. At the trial before Lord *Ellenborough,* C. J. at *Guildhall,* the plaintiff took a verdict for the amount of the defendant's subscription; reserving the point of law; and in last *Hilary* term a rule nisi was granted by the Court for entering a nonsuit.

The Attorney-General, Garrow, and *Taddy* now attempted to distinguish this from the preceding cases of *Mennett* v. *Bonham* (*a*), and *Flindt* v. *Crokatt* (*b*), inasmuch as here the licence, as well as the policy, was to cover an exportation of goods directly from *London* to *Archangel,* then an enemy's port, thereby evincing an express intention of the crown to license a trading with the enemy;

(*a*) *Ante,* 477. (*b*) *Ante,* 522.

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and therefore though the licensees named are described to be merchants of *London*, yet the words, "*and others*," may, with reference to the express destination of the goods to an enemy's port, be well construed to cover an exportation on behalf of hostile owners: for such a licence as this could not be carried into effect at all without the participation of the enemy's subjects: the goods, being to be exported to an enemy's port, must be taken to have been intended [528] for an enemy; otherwise the loss of the *British* importer was inevitable. Then, 2dly, though the condemnation was by the *Russian* government, yet upon the principle of *Usparicha* v. *Noble* (*a*), the loss may be recovered by the *Russian* assured from the *British* underwriter, who had full notice of the risk by the terms of the policy, which was in conformity with the king's licence, and excepted the case out of the rule laid down in *Conway* v. *Gray* (*b*).

Park and *Carr*, in support of the rule, were stopped by the Court.

Lord ELLENBOROUGH, C. J. Supposing this case was assimilated to that of *Usparicha* v. *Noble* upon the first point, still the objection to the plaintiff's recovery would not be done away upon the second point, that this was a condemnation of the property insured by the government of the assured's own country; which would bring the case within the rule laid down in *Conway* v. *Gray*. For in *Usparicha* v. *Noble* the condemnation was by a *French* consular court, sitting in *Spain*, upon a capture previously made by a *French* force; in which respect this case is distinguishable from that of *Usparicha* v. *Noble*. I threw out yesterday in the course of the argument of the last case, that I thought those two cases might stand together; but I then said, and say now, that if they be irreconcileable, I am so satisfied with the soundness of the doctrine in *Conway* v. *Gray*, that if I could not refuse this rule without surrendering that case, I should hold myself bound to grant it.

LE BLANC, J. (*c*) The cases of *Conway* v. *Gray* and *Usparicha* [529] v. *Noble* do not seem to me to contradict each other. In *Conway* v. *Gray* the material circumstance did not exist, which did exist in *Usparicha* v. *Noble*, that the government here had adopted the enemy's subject, whose property was insured, by granting the licence to his agent here to export the goods expressly to certain ports of the enemy; which was considered as taking the case out of the rule in *Conway* v. *Gray*, that every subject of a state was to be deemed consenting to and bound by the acts of his own government. And this case, I think, ranges itself with that of *Usparicha* v. *Noble*.

(*a*) 13 *East*, 332. (*b*) 10 *East*, 536. (*c*) *Grose*, J. had left the court.

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BAYLEY, J. I think that the two cases of *Conway* v. *Gray* and *Uspariche* v. *Noble* are distinguishable and may be reconcileable; but if they be not, I own that the discussion of this and the recent cases would induce me to doubt whether the conclusion which we came to in *Uspariche* v. *Noble* is the true one. I think we may throw out of our consideration the decisions in the Admiralty Courts, and confine ourselves to the construction of the licence by the rules of the common law: and looking to that, it appears to me that all that the crown meant by the grant of the licence was to protect the adventure against its own capture; but I do not
[530] think that the crown meant either that the adventure should be protected by *British* insurance to the port of an enemy, or that the adventurer should be protected against the acts of his own government: and I state my present opinion thus generally, in order that it may be known when the question upon such an insurance is raised again.

The rule in this case for a nonsuit was thereupon made absolute: but the case was afterwards agreed by the parties, with the consent of the Court, to be turned into a special verdict, with judgment for the defendant.

Tuesday, May 5th.

BARTON *against* FITZGERALD.

The assignor in a deed of assignment of a lease, after reciting the original lease granted to another *for the term of ten years*, which by mesne assignments had vested in him, and that the plaintiff had
[531] contracted for the absolute purchase of the premises, bargained, sold, assigned, transferred, and set over the same to the plaintiff, *for and during all the rest, &c. of the said term of ten years*, in as ample manner as the assignor might have held the same, subject to the payment of rent and performance of covenants; and then covenanted that it was *a good and subsisting lease, valid in law, in and for the said premises thereby assigned*, and not forfeited, &c., or otherwise determined, *or become void or voidable:* held that the generality of this covenant for title, which was supported by the recital of the bargain for an absolute term of ten years, was not restrained by other covenants which went only to provide for or against the acts of the assignor himself, or those who claimed under him; such as, 1st, a covenant against incumbrances, except an under-lease of part by the assignor for three years; 2dly, for quiet enjoyment; 3dly, for further assurance: and therefore where it appeared that the original lease was for ten years, determinable on a life in being, which dropped before the ten years expired, though not till after the covenant of the assignor, held that the assignee might assign a breach upon the absolute covenant for title.

THE plaintiff declared in covenant on an indenture of the 26th of *October* 1808 between the defendant and the plaintiff; *reciting* that by indenture of lease, dated the 16th of *September* 1807, *Ann Rockall* demised to *James Smith* a messuage, &c. and premises in the parish of *St. James, Westminster*, to hold from *Michaelmas* 1807 *for the term of ten years*, at the yearly rent of 50*l.*: and also reciting that by divers mesne assignments and ultimately by an assignment dated the 26th of *August* 1808, the said messuage, &c. had become vested in the defendant *for the remainder of the said term of ten years* then to come and unexpired; and reciting that the plaintiff had contracted with the defendant for the absolute purchase of the said messuage, &c. comprized in the said thereinbefore in part

recited indenture of lease for 130*l.*; the defendant, in pursuance of the said agreement, and in consideration of 130*l.* paid to him by the plaintiff, did *bargain, sell, assign, transfer, and set over* to the plaintiff all that the said messuage, &c. therein before mentioned to be demised by the said in part recited indenture of lease, and thereby assigned or intended so to be, together with the said recited indenture of lease itself, and all benefit thereof, to have and hold the same to the plaintiff from *Michaelmas* last, *for and during all the rest, residue, and remainder of the said term of ten years,* in and by the said recited indenture of lease granted, and from thence to come and unexpired, in as full, large, ample, and beneficial a manner, to all intents and purposes, as the defendant might, could, or ought to have held or enjoyed the same, if the said indenture of assignment had not been made: subject nevertheless to the payment of the yearly rent and to the performance of the covenants reserved and contained in the said therein-before in part recited indenture of lease, on the part of the lessee or assignee of the said premises thereby assigned, to be paid and performed. And the defendant by the said indenture of assignment did *covenant* with the plaintiff that the said therein-before in part recited indenture of lease *was a good and subsisting lease valid in the law of and for the said premises* thereby assigned, *and not forfeited, surrendered, or otherwise determined, or become void or voidable.* By virtue of which said indenture of assignment the plaintiff entered upon the said premises so assigned, and became possessed thereof *until* the said before-mentioned, *indenture of lease was avoided and determined,* as after [532] mentioned. The plaintiff then, after alleging performance of all things in the indenture of assignment contained in his part to be performed, &c. averred that the said indenture of lease in part recited in the said indenture of assignment thereof to him, was not a good and subsisting lease valid in the law, of and for the said premises by the last-mentioned indenture assigned, in this, that the said indenture of lease, and the term thereby demised at the time of making of such lease, and also at the time of the making of the defendant's covenant in that behalf as aforesaid, were severally *voidable and determinable by the death of one* Henry de la Touche the elder, who during the said term granted by the said indenture of lease as aforesaid, viz. on the 1st of *September* 1808, at, &c. died; and thereupon afterwards in *Trinity* term, 49 *G.* 3. one *Henry de la Touche,* who, by means of the death of *H. de la Touche* the elder, had become and then was entitled to the possession of the said messuage and premises, brought his ejectment in the court of K. B. for the recovery of the said premises, and obtained judgment, &c.

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Whereupon the plaintiff, in order to prevent his being turned out of possession of the said premises, afterwards on the 17th of *December* 1810, was obliged to yield them up to the said *H. de la Touche*, &c.

Oyer.

The defendant, after craving oyer of the indenture, set it out at length, whereby, after the recitals before stated in the declaration, the defendant bargained, sold, assigned, transferred, and set over to the plaintiff all that the said messuage thereby assigned, together with the said in part recited indenture of lease itself, and all benefit thereof, " and all the estate, right, title, interest, term and
[533] terms of years therein to come, and unexpired benefit, property, profit, claim, and demand whatsoever of the defendant in the thereby assigned premises by virtue of the said in part recited indenture of lease or otherwise howsoever, to hold, &c. (as before).

Covenants by the defendant.

And then it set out the covenants of the defendant in order; (1st,) that he (the defendant) hath not at any time theretofore made, done, or committed, or willingly permitted or suffered to be done any act, deed, matter or thing whatsoever, whereby the said premises hereby assigned *are*, can, shall, or *may be* charged, assigned, impeached, incumbered, or affected in title, estate, or otherwise howsoever, *save and except* an agreement with one *W. Anderson* for the occupation of part of the said premises for the term of three years from the 10th of *October* instant. (2d,) And also that the said in part recited indenture of lease is a good and subsisting lease, valid in the law, of and for the said premises hereby assigned, and not forfeited, surrendered, or otherwise determined, or become void or voidable. (3d,) And further, that it should be lawful for the plaintiff from time to time and at all times thereafter during the said term thereby granted, peaceably and quietly to enter into, have, hold, occupy, and enjoy the said premises assigned &c. and take the rents, &c. for his own use and benefit, for and during all the rest, residue, and remainder now to come and unexpired of the said term of ten years in and by the said in part recited indenture of lease granted, *without any the lawful let, suit, hindrance, interruption, or denial of the defendant*, his executors, &c. *or any other person* or persons lawfully *claiming* or *to claim* the said premises *by, from, under, or in trust for him*, them, or any of them. (4th,) And lastly,
[534] that the defendant should from time to time, and at all times thereafter *during the residue of the said term*, granted by the said in part recited indenture of lease, at the request and costs of the plaintiff, make, do and execute, or cause and procure to be made, done and executed, all and every or any further act, deed, matter, or thing

whatsoever *for the further, better, more perfect and absolute assigning and assuring* the said indenture of lease, and the said messuage and premises thereby demised and then assigned to the plaintiff, *for all the remainder of the said term of ten years*, which should be therein then to come and unexpired, *according to the true intent and meaning of these presents*, as by the plaintiff, &c. should be reasonably advised and required. And then the defendant pleaded, 1st, non est factum. 2dly, that the said indenture of lease, and the term thereby demised, neither at the time of making the said lease, nor at the time of making the covenant of the defendant in that behalf were voidable or determinable by the death of the said *Henry de la Touche* the elder, in manner and form as alleged by the plaintiff. 3dly, that although the said lease was *determinable* by the death of the said *Henry de la Touche* the elder, as alleged by the plaintiff, yet that the said *Henry de la Touche* did not die, nor was the said lease *determined until after* the making of the said covenant; and that *at the time of making the said covenant* the said indenture of lease was a good subsisting lease, and *then* valid in the law, of and for the said premises thereby assigned, and not then forfeited, surrendered, or otherwise determined or become void, nor had the same *then* become voidable. And 4thly, that though the said lease was voidable and determinable, and that the said *Henry de la Touche* did take such proceedings as mentioned in the declaration, yet that the said lease was not made so voidable and determinable by any act or deed of the defendant, or by his sufferance or permission, nor were such proceedings taken by any persons lawfully claiming the said premises by, from, under, or in trust for the defendant or his assigns. The plaintiff by his replication took issue on the two first pleas, and demurred generally to the two last.

Pleas.

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Marryat, in support of the demurrer, first argued that this was an absolute covenant for the validity of the lease for the residue of the term of ten years then to come, and not restrained to an avoidance of it by the defendant's own acts or those claiming under him. It is sufficient to read the clause by which the defendant, reciting that the messuage had become *vested* in him *for the remainder of the said term of ten years*, bargains, sells, assigns, transfers and sets over the said messuage to the plaintiff *for and during all the rest, residue, and remainder of the said term of ten years*. The thing bargained and sold is the residue then to come of *a term of ten years*, which imports an absolute term, indefeasible at least without the default of the lessee. A bargain and sale operates at common law, like dedi et concessi in a grant, as a covenant for good title, unless it

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be specially qualified by some other covenant; as in *Browning* v. *Wright* (*a*): but here there is no such general qualification: and no special qualification annexed to other covenants can be imported into this: as appears by the case of *Gainsford* v. *Griffith* (*b*), and that of *Howell* v. *Richards* (*c*). The first covenant by the defendant, set forth upon the oyer, is that he had not done any act to impeach, incumber, or affect the title, *except* the underlease of part of the premises to *W. A.* for three years. That covenant with its special qualification needs no comment. The second affirms the lease to be good, subsisting, and valid, and not determined, or become void or voidable. That is an absolute covenant without any qualification. The third is for quiet enjoyment for all the residue of the term of ten years, *without the lawful let or interruption of the defendant, or any person claiming under him.* These latter words are indeed a qualification of the covenant for quiet enjoyment, but no qualification of the second covenant; for if those qualifying words were annexed to the second covenant, they would make it insensible. By the fourth, which is for further assurance, the defendant covenants that during the residue of the said term, which is before stated generally as a term for ten years, he will not only do and execute, but cause and procure others to do and execute every thing "for the further, better, more perfect and absolute assigning to the plaintiff all the remainder of the said term of ten years, according to the true intent and meaning of those presents." This of course can be no qualification of the second covenant. Secondly, he argued, that the contingency which determined the lease, not having happened till after the defendant's covenant, was not the less a breach of that covenant. The third plea proceeds upon a supposition that it is sufficient to say that the lease was not *then* determined or become void, nor had the same *then* become voidable: but that is not the meaning of the covenant, which is, that the lease was not *then* determined or *become void*, nor *was voidable;* for otherwise the words "or voidable" are senseless; for if the cestuy que vie were then dead, the lease was absolutely at an end: the word *become* could not apply to voidable; or if it did, it could only mean that the lease was not liable to become voidable by any future contingency. The obvious meaning of the whole was that the defendant assured to the plaintiff the residue of a term of ten years independently of any contingency. There is no recital and no general words of qualification over-riding the whole instrument, intimating to the plaintiff that the lease was liable to expire upon any collateral contingency before the period mentioned.

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(*a*) 2 *Bos. & Pull.* 13. (*b*) 1 *Saund.* 59. (*c*) 11 *East*, 633.

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Holroyd, contrà, contended, first, that the covenant for the validity of the lease, whether general or qualified, was confined to the validity of it at the time, and did not extend to any future act. Secondly, that the covenant, though general in its terms, was qualified by the whole of the deed taken together. 1st, The words themselves clearly refer to the *then* state of the premises as to the title; and this sense of them is the more clear when taken with reference to the rest of the deed; for wherever the assignor intended to include future acts, it is so stated: as in the prior covenant, that the assignor had not done any act whereby the premises *are* or *may be* incumbered: and again in the subsequent covenant against his own acts or those claiming or *to claim* under him. He covenants, (2dly,) that the lease is not determined, &c. or *become* void or voidable; which word "*become*" must apply to *voidable* as well as void, otherwise the word *voidable* has no verb to govern it. Then suppose it were a life estate, such an estate is greater in the law than any term for years, and it could not be presumed that the life would end before the term. It might apply to a lease granted by tenant in tail, in which case it would not be absolutely void on his death, but would be confirmed by the remainder-man's accepting rent. The words, "or voidable," may also apply to rights of re-entry for breaches of covenant; and until waver of the forfeiture the lease would be *voidable*. If such a covenant were not confined to the state of things at the time, it would go to assure the validity of the lease notwithstanding any act of the assignee himself to make it void. The words "bargain, sell, assign, transfer, and set over," are not words of covenant, like *grant*, which is a word of creation. [Lord *Ellenborough*, C. J. Do not the words "*bargain and sell*" as much imply that the party has the thing which he professes to bargain and sell, as the word *grant?*] They only assume the disposition of that which he has already in him at the time. The rule caveat emptor applies to the sale of a chattel where there is no fraud. He only bargains, sells and assigns to the plaintiff to hold in as ample a manner as the defendant himself might have held, which are in themselves restraining words. Then at the time of the assignment and covenant the lease, which was carved out of a greater estate for life, had not become voidable. [Lord *Ellenborough*, C. J. The assignee sees nothing but the covenant; and do not the words of it import a valid lease which was certain to enure for the remainder of the ten years' term?] The covenantor is merely an assignor of a subsisting lease, and could no more look at his landlord's title, than the assignee. [Lord *Ellenborough*, C. J. You would read the word

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"*and*" ("*and* not forfeited or voidable," &c.) not as accumulative but as restrictive of the words covenanting for the validity of the lease "of, and for the said premises thereby assigned;" as if it ran, "that is to say, not forfeited," &c.] Taking the whole covenant together, that is the meaning of it, otherwise the subsequent words, "and not forfeited," &c. are useless. [Lord *Ellenborough*, C. J. Those words would relate to acts done by himself; to any acts making it void or voidable by his own procurement.] Where a party is not creating any estate, but merely assigning that which he had from another, he ought not to be bound upon the strict sense of the words, with reference to the state of things at the time. Then, 2dly, though the covenant for the validity of the lease be in its terms general, yet taking the whole instrument together, the intent of the assignor appears to be, not to guaranty the duration of the lease absolutely, but merely to covenant against the acts of himself and of those claiming under him. For though restrictive words at the end of an intermediate covenant cannot be applied to the whole, which was the case of *Gainsford* v. *Griffith* (*a*); yet general words of restriction either by way of introduction to the whole, or at the conclusion over-riding the whole, may be so applied. And that case was not argued and determined with reference to the intent to be collected from the whole deed. *Howell* v. *Richards* (*b*) only decided that the generality of a covenant for quiet enjoyment was not to be restrained by qualifying words in the special covenant for good title: but Lord *Ellenborough*, in delivering the judgment in that case, refers to what was said by Lord C. J. *Hobart* in *Trenchard* v. *Hoskins* (*c*), that every deed is to be construed according to the intention of the parties, "and the intents ought to be adjudged of the several parts of the deed, as a general issue out of the evidence; and intent ought to be picked

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out of every part, and not out of one word only." And in *Browning* v. *Wright* (*d*), there referred to, a covenant in general terms, that the defendant had full power to convey, was restrained by the subsequent covenants, which were confined to his own acts. Now here the meaning of the second covenant, though general in its terms, is to be collected from all the others, which are confined to the existing state of things; noscitur a sociis. The first is that *he* (the assignor) *hath* not done anything to encumber the premises, except in one particular stated. That is a covenant against his own acts merely. So the third is for quiet enjoyment from the lawful interruption of the assignor, or any person claiming from him: but if the second be construed to be a covenant for title generally, it

(*a*) 1 *Saund.* 59. (*b*) 11 *East*, 633. (*c*) *Winch*, 93. (*d*) 2 *Bos. & Pull.* 13.

would make him in effect covenant against the acts of others. [Lord *Ellenborough*, C. J. Though the second covenant were construed generally, the third might still have something to operate upon: for the original lease and the assignment of the term to the defendant might be perfectly good, yet he might have assigned it away to another before the covenant.] If the covenant for the validity of the lease of the premises assigned to the plaintiff were general, the special covenants would be of no use. If this construction be right upon either of the points, the defendant is entitled to judgment, and the declaration itself is bad, the plaintiff having declared upon a general covenant without the qualifications to be collected from the same deed.

Marryat, in reply, adverted to the recital in the deed, which only mentions a lease of ten years, without the qualification now relied on; and all the covenants are framed with reference to that recital. *Assign* in a lease is a general word of covenant, as much as *demise* (*a*). In *Seddon* v. *Senate* (*b*), where the defendant had bargained, sold, and assigned to the plaintiff all his right in a medicine, this was held to raise an implied covenant that the whole of the thing so bargained, sold, and assigned should be the exclusive property of the vendee: but there indeed the breach laid was upon the vendor's own act. Here the defendant has covenanted that the lease for ten years was not only not then void, but was not voidable, when it was then liable to be avoided, and was afterwards avoided by an original infirmity in the lease itself. [541]

Lord ELLENBOROUGH, C. J. It is a rule of construction that the sense and meaning of the parties in any particular part of an instrument may be collected ex antecedentibus et consequentibus: every part of it may be brought into action in order to collect from the whole one uniform and consistent sense, if that may be done. This is a hard case upon the defendant, who may perhaps be made to suffer from the negligence of the person who prepared the deed for him, by covenanting for title in too general terms. We can only look however to the sense and meaning of the parties as they are to be collected from the deed itself. It begins by reciting that the premises were demised *for the term of ten years*, and that by assignment in the following year they had become vested in this assignor *for the remainder of the said term of ten years*. This recital is fairly to be brought forward in order to construe every covenant in the deed: and when I find such a recital of an absolute term without any qualification, it is a considerable [542]

(*a*) 2 *Bac. Abr. tit. Covenant, B. p.* 65, *&c.* (*b*) 13 *East*, 75.

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help to the construction of a subsequent covenant, where he covenants in absolute terms that it is a good and subsisting lease, valid in law for the premises thereby assigned, and not forfeited, &c. or otherwise determined, or become void or voidable. After such recital the assignor bargains, sells, and assigns, &c. to the assignee the demised premises, with the indenture of lease, to have and hold the same to the assignee *for and during all the rest, &c. of the said term of ten years,* which he had before contracted to sell, in as ample manner, &c. as if that assignment had not been made. In no part is there any mention of the term being determinable by the death of *H. de la Touche*; therefore the assignee had nothing to guide him, as to the duration of the term, but the language used by the assignor in describing it. Then the assignor covenants, first, that he has done nothing to incumber the premises, except the under-lease of part to *Anderson*. He did right to introduce that exception: but that is an under-lease for three years absolute: and that very exception imports that he had a right to incumber absolutely for three years. Then comes the second covenant relied on by the assignee, that it is a good and subsisting lease, valid in law, of and *for the said premises thereby assigned, &c.* and not forfeited, &c. or become void or voidable. It is said that it was a good, subsisting and valid lease of the premises; but the covenant goes further, and affirms its validity *for the premises thereby assigned*; now that included a lease for the residue of the term of ten years absolute. [543] Then follows the covenant for quiet enjoyment against the acts of himself or any other person claiming under him. That would not be rendered unnecessary, though the previous covenant should be construed absolutely; for the one relates to the title itself, the other to the assignor's own acts subsequent to its vesting in him, to protect the assignee against any sub-leases or assignments before granted by the assignor, which would not make the original lease invalid. The last covenant is for further assurance. It appears, therefore, that all the other covenants would be operative, though the second were construed to be absolute. If the rest of the covenants had imported a contrary intent to the general words then appearing to have been improvidently introduced into one part of the deed, the case would have admitted of a different consideration: but when I find a recital in the beginning of the subject matter of the contract, being for the residue of a term of ten years, without any contingency annexed, and afterwards find an absolute covenant in its terms for the validity of such a lease, together with other covenants against his own acts and those claiming from him; I cannot say that we are not

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to give effect to the general words of the covenant; and we cannot do otherwise, without rejecting the word *and*, and reading instead of it, *that is to say:* but looking at the whole deed, there is nothing from whence we can collect such a meaning as would warrant so narrowed a construction.

GROSE, J. The question arises on the words of a covenant, and we have to consider what was the intent of the covenantor. On the one side it is said to have been his intention to sell and assign a certain lease for the remainder of a term of ten years undeterminable: that is denied on the other side, who say that the intention was to covenant only for a lease for that term, determinable on the death of a certain person. Such being the contention on either side, this is the plainest case I ever saw. The defendant professes in the deed to sell the residue of a certain term of ten years: the words do not import that it was a term determinable on the death of any person, or that it was determinable at all before the end of ten years, except indeed by the act of the assignee himself; but that it was for an absolute term of ten years in its creation. Then he covenants in general terms that it is a good and subsisting lease, valid in law for the premises assigned, and not determined, or become void or voidable. The plain meaning of this is that the lease, before described as a lease for ten years without any qualification, was to last for the ten years, unless it were before determined by the act of the assignee. And taking into consideration also all the other covenants, it is clear that the parties intended that the assignee should have the lease for the residue of the ten years, not determined, or void, or voidable but by his own act.

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LE BLANC, J. The question arises on the second covenant, and branches into two considerations; first, whether taking that covenant by itself, on which alone the plaintiff in his declaration has assigned a breach, and applying it to the third plea, in which the defendant states that though the lease was determinable by the death of *Henry de la Touche*, yet that it was not determinable till after the making of the covenant, but that at the time of making the covenant it was a good subsisting lease, *then* valid, and not determined, or become void, nor had *then* become voidable; the breach is well assigned. It is contended by the assignor that he had at the time of the covenant a valid lease for the residue of the term of ten years, and not then voidable, notwithstanding it was determinable on the death of *H. de la Touche*, who was then living. What the lease to the assignor himself contained does not appear; but we are to collect that it was determinable on the death of *H. de la Touche*. Consider then what was the bargain be-

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tween these parties. The defendant recites in his deed a lease of the premises for ten years, which had come to him by assignment for the residue of that term: this it is which he professes to sell, and for which he enters into this covenant. Then when he covenants that the lease is valid in law for the premises thereby assigned, is not that a covenant that it is a lease valid for the whole term for which it is before expressed that it had to run. The validity of it does not depend on its being valid for one or two years of the term, but for the whole term of ten years, which was the duration of the term bargained for; therefore the death of *H. de la Touche* not having happened before the making of the covenant is no answer to the action. The other consideration is whether the second covenant, thus general in its terms, and certainly comprehending and securing the assignee against the event which has happened, is restrained by other words of covenant, limiting the covenant for quiet enjoyment to the acts of the assignor or persons claiming from him; and against that the case of *Gainsford* v. *Griffith* is a strong authority. I agree that the intent of the parties is to guide the construction of the covenant; and that in order to ascertain that intent we may call to our attention all the covenants of the deed: but I cannot say that an assignee would not require an absolute covenant for a valid lease during the whole term bargained for, though he also required a covenant against the party's own acts and the acts of those claiming from him.

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BAYLEY, J. I entirely agree with the rest of the Court upon the construction of the covenant for title. The defendant recites in his deed the original lease granted for ten years, and the vesting of the term in him by assignment; and as he does not describe it as subject to any qualification to make it determinable before the end of the ten years, it must be taken to be an absolute lease for that term. Then comes the general covenant in the words which have been mentioned; and by the known rule of law the words of a covenant are to be taken most strongly against the covenantor. I admit, however, that they may be restrained by other words in the deed, if we can see a clear intention to restrain them from the other parts of the deed. But it would be a very dangerous rule, if it were to be applied to every case where ingenuity can shew that by giving the natural meaning to the words of the general covenant, other words in other parts of the deed might be rendered nugatory. The intention therefore to restrain the general words, as it is to be collected from the other parts of the deed, must clearly appear. In *Browning* v. *Wright*

the Court said that the latter sentence, that the covenantor had full power to convey, might be read as parcel of the preceding sentence by which he covenanted that, *notwithstanding any act by him done to the contrary*, he was seised of the premises conveyed in fee: for it was observed that he should covenant that he had an absolute right to convey, though he would not covenant absolutely that he was seised in fee, but only that he was seised in fee notwithstanding any act of his own. There was therefore a clear intent apparent in that case to restrain the general words relied on.

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Judgment for the Plaintiff.

PHILLIPS and Others, Assignees of WHITE, a Bankrupt, *against* RODIE and Others.

Tuesday, May 5th.

IN trover for 179 bales of cotton, which was tried at *Lancaster*, before *Wood* B., a verdict was found for the plaintiffs for 1955*l.* 18*s.* 2*d.*, subject to the opinion of the Court on the following case.

Where the freighter of a ship covenanted that if she should not be fully laden, he would not only pay for the goods on board, but also for so much in addition as the ship would have carried, for which he had before stipulated to pay freight, according to different rates for three descriptions of goods; held that the ship-owner had no lien upon the goods actually on board for the amount of the *dead freight*, in other words, for the compensation in damages which he was entitled to for the freighter's breach of contract in not putting a full loading on board; which damages were unliquidated; and there being no lien in such a case either by the usage of trade or the express contract of the parties.

Nor had the ship-owner any lien for demurrage.

On the 15th of *October* 1810, *White*, the bankrupt, entered into a charter-party with the defendants for the hire of the ship *Flora*, of which the defendants are owners, on a voyage from *Liverpool* to *Surinam* and back again. By the charter-party the vessel was to carry such lawful goods as *White* or his agents chose to put on board, without any specification as to the sort of goods. And after providing for the delivery of the outward cargo at *Surinam*, and loading the homeward cargo there for *Liverpool*, the defendants agreed that the master should proceed, wind and weather permitting, with the vessel and cargo to *Liverpool*, and on her arrival there should deliver the same to *White* or assigns, in the same state and condition as when put on board; the dangers of the seas and other inevitable accidents excepted; and to end the said intended voyage. *White* agreed that he would, within 21 running days to be computed as after mentioned, cause a cargo of lawful goods to be loaded on board the vessel at *Liverpool*, and in 40 running days would cause the same to be discharged, and the vessel loaded again with a full and complete return-cargo of lawful goods at *Surinam*, and to be discharged in *Liverpool*. *White* also agreed to pay to the defendants for the freight of the vessel

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from *Liverpool* to *Surinam*, for all goods put on board, and in lieu of custom-house duties, &c. 105*l.*, by an approved bill on *London*, not exceeding three months' date; and for the freight from *Surinam* to *Liverpool*, for all goods put on board her at *Surinam*, at the following rates, viz. 11*s.* for every cwt. of sugar, 12*s.* 6*d.* per cwt. in every bag of coffee, 13*s.* 6*d.* per cwt. in every cask of coffee, 2½*d.* for every pound of cotton in square bags, and 3*d.* for every pound of cotton in round bags. But *if the vessel should not be fully laden with the return-cargo, then* White *should not only pay for the goods which should be on board, but also for so much in addition as the vessel would have carried. And in case* White *should not within the time aforesaid put any lawful goods on board the vessel, then that he should, on the arrival of the vessel at* Liverpool, *pay full freight for the vessel to the defendants, as if she had been fully laden with goods of the description before mentioned:* with 5*l.* per cent. primage in lieu of all pilotage, port, and other charges: such freight and primage to be paid in the following manner, viz. so much money as might be necessary for the ship's disbursements at *Surinam*, to be paid there free of commission and interest, and the remainder to be paid on the delivery of the cargo at *Liverpool*, in an approved bill on *London*, not exceeding three months' date.

[549] And in case *White* should not cause the cargo to be put on board the vessel at *Liverpool* within 21 running days, to be computed from the time of her being ready to receive the cargo, and notice thereof given to *White*, &c. then *White* should pay to the defendants 15*l.* 15*s.* for demurrage for each day, &c. over and above the said 21 days for loading the vessel at *Liverpool*. And in case *White* should not cause the vessel to be discharged at *Surinam*, and there loaded with her homeward cargo, within 40 running days, to be computed from her arrival at a proper place of discharge, and being reported ready to unload and load the return-cargo, and notice thereof to *White*, &c., then that he should pay to the defendants the further sum of 15*l.* 15*s.* for demurrage for each day not exceeding 20 days over and above the said 40 days, &c. for discharging and loading the vessel at *Surinam;* but *White* should not on any account detain the vessel beyond the said 20 days after the expiration of the said 40 days, but should prior to that period load the vessel with a full and complete cargo of lawful goods as before mentioned.

The case then stated that the ship sailed from *Liverpool* within the time limited by the charter-pay, and arrived at *Surinam*, and there delivered her outward cargo to *White*'s agent. That *White* paid the defendants for the freight of the ship from *Liverpool* to

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Surinam, pursuant to the terms of the charter-party. That the ship was detained by *White* at *Surinam* 18 days beyond the time limited in the charter-party for that purpose, and thereby 283*l.* 10*s.* accrued for demurrage of the vessel for such time as she was so detained; and a bill was drawn by *White*'s agent in favour of the defendants at 60 days' sight, upon *White*, for that sum; but before the bill arrived, *White* having become bankrupt, it was refused acceptance before the demand of the goods as after [550] mentioned, and still remains unpaid to the defendants, who are now the holders thereof. That the ship sailed from *Surinam* on the 3d of *February*, and arrived at *Liverpool* on the 22d of *March* 1811; which was after *White*'s bankruptcy; having 179 bales of cotton on board, containing 57,225 pounds, which were the property of and consigned to *White;* and three several bills of lading were given to the agent of *White*, by the captain of the *Flora*, one of which is dated *Surinam*, 24th of *January* 1811, for 121 bales; another dated 2d of *February* 1811, for 19 bales; and the 3d dated 2d of *February* 1811, for 39 bales. The form of one of the bills of lading was set forth in the case, of which this is the substance—"Shipped by the grace of God, &c. in the good ship *Flora*, &c. now riding in the river *Surinam*, bound for *Liverpool*, to say, 121 bales cotton, being marked, &c., and are to be delivered in like good order, &c. at *Liverpool;* (the act of God, &c. excepted,) unto *T. White*, or his assigns, *he or they paying freight for the said goods*, and three stivers per pound, with primage, and 10*l.* per cent. average accustomed. In witness," &c. *White*'s agents also loaded on board the ship at *Surinam* about 60 bales of other cotton or freight, which freight has been received by the defendants. The 179 bales of cotton belonging to *White* were put on board the *Flora* before or on the respective dates of the said bills of lading. The ship was not loaded at *Surinam* with a full and complete return-cargo of lawful goods by *White*, according to the tenor of his covenant, but there was sufficient room in the vessel to stow 299 bales of cotton over and above the quantity on board, and independent of one-eighth of the whole space of the hold, which was occupied by ballast, which would [551] have been unnecessary if the ship had been fully laden with a complete cargo of goods; and the deficiency in the freight, on account of the vessel not being laden with a full and complete cargo of cotton, would amount to 1254*l.* 15*s.* 6*d.;* but if loaded with sugar or coffee, the amount would be to be ascertained by a different calculation. The plaintiffs, as assignees of *White*, on the 10th of *April* last demanded from the defendants the delivery

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to them (the plaintiffs) of the said 179 bales of cotton, and tendered to the defendants a sufficient sum for freight, primage, duties and other landing expenses on the said 179 bales. But the defendants refused to deliver the said 179 bales to the plaintiff, or to accept the money tendered; alleging they had a right to retain the same, and had a lien thereon for the freight on the deficiency in the vessel's cargo, which is usually called *dead freight*, according to the terms specified in the charter-party and the covenant of *White;* and also of the demurrage due on account of the vessel's being detained at *Surinam* as aforesaid; but which demands for demurrage or dead freight the plaintiffs refused to pay. The value of the 179 bales of cotton, after deducting freight upon them at 3*d.* per pound, and primage thereon, duties, broker's charges, and all other expenses, are agreed to amount to 195*l.* 18*s.* 2*d.*, for which the verdict was taken. If the plaintiffs were entitled to recover, the verdict was to stand: otherwise, a nonsuit was to be entered.

Littledale, for the plaintiffs contended that the defendants had no lien either for the demurrage or dead freight; the claim of a lien
[552] on the cargo for demurrage was neither warranted by the charter-party, by any usage of trade found, or by any legal precedent. But even if such a lien could exist, it would have been waved in this case by the defendants having taken a bill payable at a future day for it. Next, there can be no lien for dead freight, as it is called, which is a mere nonentity, the only satisfaction for which rests on the covenant, which is personal. A lien is properly a right to detain specific property for something due in respect of it until payment be made; such as artificers have for the value of their work on the goods of another; carriers for the carriage of goods; though liens may exist in other cases by express contract, or implication. So owners of ships have a lien for freight, that is, for the actual carriage of the goods (*a*). If the freight had been agreed to be paid at so much a ton on the ship's measurement, the defendants would have had a lien for it on the goods actually shipped, whether more or less; but here it was made payable according to different rates upon specific goods: and if they could detain the goods on board for freight not earned, it would exclude the freighters from pleading that they were ready to have loaded a complete cargo but for the captain, who refused to take it in. Upon this contract for different rates of freight on different goods the amount is uncertain, where the freight was not in fact earned; so that the freighters could not tell for how much they were to give their bill; and it must be equally doubtful by what

(*a*) *Roceus*, p. 1. and *Blakey* v. *Dixon*, 2 *Bos. & Pull.* 321. were cited.

rule the compensation is to be made; it rests therefore in damages, to be assessed with reference to the usage of trade (*a*). Perhaps it might * be too much to say that there was no lien in this case upon the goods unshipped at the docks: the unloading is an act going on from day to day; and perhaps *White* might not be bound to give the bill till the last package was ready to be delivered. [* 553]

Richardson, contrà, as to the last observation, said that the master might continue his lien by landing the goods in the docks at *L.* in his own name, and might make an entry in his own name in the dock books, to continue his lien; and therefore the cargo being several days in landing could make no difference in this case. But the sole question intended to be made was upon the fair meaning of the charter-party, which goes further than the common form, in stipulating that if the vessel should not be fully laden with the return-cargo, *White* should not only pay freight for the goods on board, but *for so much in addition as the vessel would have carried.* And it also provides that in case of there being no cargo put on board, he shall still pay *full freight*, as if she had been fully laden with goods of the above description. [*Le Blanc*, J.] Must not the amount depend upon the description of the cargo?] That is regulated by usage, and the proportions are understood by the parties. The payment in any case is reserved to be made *as freight*, and the contract of the parties must be construed with reference to the state of things if the ship had been fully laden, so far as there is any subject-matter for the accustomed lien to act upon. [Lord *Ellenborough*, C. J. If any lien were established in this case, it must be to the extent which the arbitrators should award; for the amount must be a subject of reference (*b*); and that would be a novel species of lien at common law.] It may be calculated by usage, as easily as the value of work in ordinary cases. [Lord *Ellenborough*, C. J. We must then assume that there existed a known usage in these cases, and that both parties were cognizant of it at the time when the contract was entered into, and contracted with reference to it. Does not a lien for *freight* mean for goods actually carried? but this is a lien upon air; for goods not carried. *Bayley*, J. What terms are there in the charter-party from whence it can be collected that the freighters were bound to carry such a proportion of each commodity; for example, what was there to oblige them to load coffee?] Usage regulates the proportions; and as there is no doubt that an action of covenant would lie to [554]

(*a*) *Bell* v. *Puller*, 2 *Taunt.* 299. and *Abbot on Merch. Ship.* 274.

(*b*) See a case of this sort, *Harrison* v. *Wright*, 13 *East*, 343.

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recover damages for the breach in not loading fully, the amount must be capable of reasonable certainty. If the goods were not loaded by the master's fault, that would be an answer to the demand; and whatever would be a defence to an action on the covenant would take away the lien: and the plaintiffs might have discharged the lien by tendering a sum sufficient to discharge the demand.

Lord ELLENBOROUGH, C. J. It is impossible in this case, without the intervention of a jury or an arbitrator, to settle what is the sum to be tendered: it would be taking a leap in the dark. Where there is no custom to regulate the proportions and the amount, the case must necessarily rest in damages. What is a lien for freight but a right to detain the goods on board until the freight which has been actually earned upon them, which is always capable of being calculated and ascertained, has been paid, and where the owner of
[555] the goods knows what he is to tender? But here the claim to retain is for the amount of damages unascertained, which the parties are entitled to recover for the non-completion of the cargo, commonly called *dead freight;* but it is that term, *freight,* which has misled the defendants; for it is not *freight,* but an unliquidated compensation for the loss of freight, recoverable in the absence and place of freight. The covenant is in effect to load the vessel fully, or if not, to indemnify the ship owner by paying so much in addition as the vessel would have carried: the covenant, in the event of no loading, is to pay full freight *for the vessel,* (not for goods not loaded,) as if she had been loaded with goods of the description before mentioned: that must depend on the tonnage of the vessel. In order to found the argument, the covenant should have been to pay full freight as if the goods had been actually loaded on board, and that the master should have the same lien upon the goods actually on board as if the ship had been fully laden with all the goods covenanted to be loaded. But if we were to put this construction upon the contract as it now stands, it would be making a new contract for the parties. There is no pretence or colour for the lien cow claimed; it is a lien to attach upon a nonentity: the plaintiffs' action of trover, therefore, is not met by any defence.

GROSE, J. A lien must attach upon some certain thing; and here there is nothing for it to attach upon.

LE BLANC, and BAYLEY, Justices, assented.

Postea to the Plaintiffs.

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HARDING *against* WATTS.

Tuesday, May 5th.

Arbitrators may choose an umpire either before or after the time limited for making their own award, if the umpire be chosen within the time limited for his umpirage.

TO debt on bond, dated 18th of *January* 1810, for 250*l.* the defendant set out the condition on oyer, which was, that if one *J. Johnson* should perform the award of *T. S.* and *T. O.* touching all actions, &c. and demands between him and the plaintiff, "so as the award of the said arbitrators be made in writing, &c. on or before the 1st of *March* 1810; and if the said arbitrators should not make such their award as aforesaid within the time above limited for that purpose, then if *J. Johnson* should truly perform the award and umpirage of such person as the said *T. S.* and *T. O.* should choose and appoint as an umpire in and concerning the premises, so as the said umpire made his award and umpirage in writing, &c. on or before the 25th of *March* 1810; then the obligation should be void." The defendant then pleaded, 1st, that the arbitrators did not make any award touching the premises so referred to them by the time for that purpose limited in the said condition, *nor did they choose or appoint an umpire concerning the premises, according* to the form and effect of the said condition. 2dly, He pleaded that no award of the arbitrators, touching the premises so referred to them, was made in writing, &c. before the 1st of *March* 1810, nor did they *on or before that day* choose or appoint an umpire concerning the premises aforesaid, but altogether refused and neglected so to do; whereby the authority of the said arbitrators thereupon became extinct, and the said writing obligatory became wholly void. The plaintiff replied to the first plea, that the arbitrators, after the making of the said writing obligatory, *and before the 25th of March* 1810, to wit, on the 14th of *March* 1810, did choose and appoint one *S. Jackson* as umpire, &c.; and that he having taken on himself the said umpirage in pursuance of the said reference, afterwards and before the said 25th of *March*, to wit, on the 24th of *March* 1810, made his award and umpirage in writing, &c., and thereby found that the said *J. Johnson*, before and on the 18th of *January* 1810, was justly indebted to the plaintiff in 220*l* on the balance of accounts, and ordered the said *J. Johnson* to pay that sum to the plaintiff at, &c. on the 25th of *June* then next, &c. The plaintiff then alleged the non-payment by *J. Johnson* to the plaintiff of the sum awarded, &c.: and to the 2d plea, the plaintiff demurred generally. The defendant joined in that demurrer, and also demurred generally to the replication to the first plea.

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Littledale, for the plaintiff, was stopped by the Court, who mentioned *Adams* v. *Adams* (*a*) and *Burdet* v. *Harris* (*b*) as in point.

Campbell, contrà, said that the old cases had proceeded upon a wrong foundation, that the arbitrators could not choose an umpire before the day for making their award, according to *Reynolds* v. *Gray* (*c*); but this was overruled in *Roe* v. *Doe* (*d*), in which the

[558] Court thought it was rather the best way to elect the umpire at once in case of the arbitrators disagreeing: and it is more consonant to principle that they should be obliged to appoint the umpire before the day when their own authority as arbitrators expires; for it is in their character of arbitrators only that authority is given to them to appoint an umpire.

Lord ELLENBOROUGH, C. J. It is very convenient for arbitrators to begin by appointing an umpire, because they are more likely to agree upon a proper choice of one before they themselves begin to quarrel: but if the parties have not expressly restrained them from making the choice after the time for making their own award expires, there is nothing to restrain them in reason and sense from choosing the umpire at any time while he has power to act. Such a choice is collateral to the power which they themselves have of awarding between the parties. They may choose the umpire either before or after the time for making their own award expires, provided it be within the time given to the umpire.

Campbell then objected upon the second plea, that the arbitrators, having once refused to appoint the umpire, had renounced their authority, and were functi officio, and therefore could not proceed to choose one afterwards. But

[559] BAYLEY, J. observed that the refusal was confined to a period on or before the 1st of *March*, and their power extended to the 25th, before which it was executed.

Per Curiam, Judgment for the Plaintiff.

(*a*) 2 *Mod.* 169. (*b*) 3 *Keb.* 387.

(*c*) 1 *Salk.* 70. 1 *Ld. Ray.* 222. and 12 *Mod.* 120.

(*d*) 2 *Term Rep.* 644. The Court there only said that it rather seemed to be the fairest way for the arbitrators to choose the umpire before they entered into the examination of the subject; and that it had been so determined in this court about thirty years before. This was the case of *Doyley* v. *Pitslow*, *E.* 28 *Geo.* 2., in which Lord C. J. *Ryder* decided that arbitrators might choose an umpire within the time limited for making their own award. The last mentioned case was cited by Lord *Kenyon* in the case of *The King* v. *Outram*. *T.* 29 *Geo.* 3. where the same point was ruled upon a mandamus to a commissioner under an inclosure act to execute an award.

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DAVY and Another *against* MILFORD.

Tuesday, May 5th.

Upon a policy of insurance on *flax*, valued at so much, and warranted *free of particular average*, if the vessel be wrecked, and the assured do not abandon but labours to save the cargo, and in fact saves a part (1-16th), though much damaged, they are entitled to recover as for a total loss of that part which was in fact totally lost, but not for the rest which was saved to them in specie, though deteriorated.

THIS was an action on a policy of assurance made on the 9th of *November* 1810 for 200*l.* upon flax valued at 400*l.* at and from *London* to *Exeter*, on board the ship *Commerce*, and insuring the plaintiffs against the perils of the seas and the other usual risks in the common printed form. The premium paid was one guinea and a half per cent.; and the flax was by the policy *warranted free of particular average*. The plaintiffs declared as for a *total loss* by the perils of the seas. At the trial before *Bayley* J. at *Exeter*, a verdict was found for the plaintiffs for 194*l.* 10*s.* subject to the opinion of this Court on the following case.

The plaintiffs were owners of the flax in question, which was shipped at *London* on board the *Commerce* in *November* 1810, and was packed in mats, in 24 separate packets, and weighed altogether 5 tons, 6 cwt., 1 quarter, and 8 pounds. On the 9th of *November* 1810 the policy was subscribed by the defendant at *Exeter* for 200*l.* at the premium of one guinea and a half per cent. but if the warranty against *particular average* had not been inserted in the policy, the premium would have been two guineas per cent. The *Commerce* sailed from *London* on the voyage insured with the flax on board in the latter part of *November* 1810, and in the course of her voyage was wrecked off *Rye* on the coast of *Sussex*, about half a mile from the shore. Part of her sunk there, and every person on board perished. Soon after the intelligence of the shipwreck had been received at *Exeter*, near which place the plaintiffs lived, they addressed the following letter to Captain *Mackwell* at *Lydd*, near *Rye*, *Kent*, who had previously been dispatched by other persons having an interest in the ship and cargo to *Lydd*, in *Kent*, for the purpose of taking care of so much of the same as could be saved. "*Crediton*, 17th *December* 1810. Sir, —We have just heard of the loss of poor *Eales* with his brig the *Commerce*, and as we are informed you are gone to see that proper care is taken of what may be saved from the wreck, we beg to call your attention to our goods. We had on board, as per manifest, 24 mats of flax, some part of which we hope will be found; and if so, we request you will have the mats opened, and the meads or bundles spread about in a dry place, to prevent its heating, which would injure it much: and when we know the quantity saved, and the state it is in, we will either give directions about it, or send some one to take charge of it. No doubt you will inform Messrs.

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Kennaway of the state of the cargo. We shall feel obliged also if you will give us as early an account as you can of the quantity of our flax that is come on shore, with the state it is in, and under whose charge it is; and we hope whoever has got it will attend to your instructions for preventing its laying together wet, so as to heat. We are particular in this respect, because it is an article that would very soon injure, indeed in a short time would be good for nothing, as it would rot. We dare say you are informed of the mode of settling the salvage: the goods must be valued in
[561] their present state, and not according to invoice, unless any articles should be preserved uninjured, which we fear will not be the case. Requesting your early reply, we are, Sir, your very obedient servants, *S.* and *I. Davy*." On the 24th of *December* 1810 the plaintiffs, together with two others interested in the cargo of the *Commerce*, executed a letter of attorney; by which they appointed Captain *Mackwell* their attorney, to claim, sue for, recover, and receive from the lord warden of the Cinque Ports, the officers of customs or excise, and all other perons, all the goods belonging to them which could be recovered from the wreck, and to adjust and pay such salvage, &c. and make such agreement respecting the same, as to the said attorney should seem meet; including also power to sell and dispose of such goods, and also to take legal means for the recovery of the same, &c. On the same day one of the plaintiffs made oath before a master extraordinary in chancery, that he and the other plaintiff were the real and bonâ fide owners of 24 mats of flax shipped on board the *Commerce*, and that the vessel had then lately been wrecked or stranded, with all the said flax on board, in the course of her voyage, on or near the coast of *Kent* or *Sussex*, as he believed. The said letter of attorney and affidavit were sent by the plaintiffs to Mr. *Mackwell* in the following letter. "*Crediton*, 24th *December* 1810. Sir,—Herewith we hand you a power of attorney and affidavits from ourselves and others to enable you to do the needful respecting the goods per *Commerce*. We have been disappointed in not hearing from you, as we are uninformed what quantity of flax is saved: we therefore request you will favour us with a few lines, saying what is saved,
[562] and the state in which it is. We hope you have had the bales opened, and the bundles put about to dry." (Signed by the plaintiffs.) After the wreck of the *Commerce*, part of the flax floated on shore in a loose state, out of its packages, and was mixed with a little sand, and injured; and other part of it was afterwards gotten out of the bottom of the vessel, which was sunk as aforesaid, at different times, and was brought to *Lydd* and *Rye*. The

quantity altogether thus saved was about a ton. No entire package came on shore, but the flax that was saved came ashore loose and wet; and as flax is a perishable commodity, it was necessary to sell it on the spot; and it was therefore sold by persons employed by Captain *Mackwell* there, who acted under the power of attorney, and received the proceeds thereof. The gross proceeds of what was saved amounted to about 27*l.*, and the neat proceeds to 11*l.*; being $2\frac{3}{4}$ per cent, upon the sum at which the flax was valued in the policy, and at which it was insured. No notice of abandonment was ever given to the underwriters by the plaintiffs. If under the above circumstances the plaintiffs were entitled to recover, the verdict was to stand for 194*l.* 10*s.*, or such other sum as the Court should think right: if they were not entitled, then a nonsuit was to be entered.

Gifford, for the plaintiffs, contended that this being a case of total loss, with benefit of salvage, the verdict should stand for the whole sum recovered. The warranty for the underwriter to be free of particular average is only to save him harmless if the goods arrive at the port of discharge in a damaged state, but does not apply to the case of a total loss in the course of the voyage, though some may be saved from the wreck. Neither is any abandonment necessary where the loss is by the ship and cargo being wrecked; for that is in its nature a total loss: but where the loss in its nature is only partial, or constructive; such as the loss of the voyage; there, in order to render it a constructive total loss, abandonment is necessary. Here the flax when shipped was packed in 24 mats, and after the wreck not one entire package came on shore, but part of it floated on shore in a loose state mixed with sand, and other part was gotten from out of the vessel lying under water much damaged, and in quantity not a fifth of the whole. [Lord *Ellenborough*, C. J. That part which was saved cannot be said to be totally lost: it was only deteriorated in value.] That part at least which was sunk and never regained again must be said to be totally lost. [Lord *Ellenborough*, C. J. Unless I hear any sound argument to the contrary, I should think that the policy was to be construed *divise*; that is, that as to the part which was not saved from the wreck, there was a total loss; and as to that which was saved, but damaged, it was a partial loss.] That would entitle the plaintiffs to recover part of their demand only; unless the circumstance of the whole cargo having been sunk and lost for a time, though part of it afterwards came on shore and was gotten out of the wreck, brings this within the description of a total loss with benefit of salvage. [Lord *Ellenborough*, C.J. In *Anderson* v.

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The Royal Exchange Assurance Company (*a*), though there was a submersion of the cargo at high water for nearly a month, yet as it was afterwards saved, though damaged, and restored, it was held not be a total loss, there having been no abandonment in time.] There the ship and cargo, which was corn in bulk, remained entire: here the ship was wrecked, and the packages in which the flax was secured were all destroyed. [Lord *Ellenborough*, C. J. The ship there ceased to exist for any useful purpose at the time, and the corn was obliged to be kiln-dried before it could be sent on in another ship.] At all events then there was a total loss of that part which was not brought to shore.

Casberd for the defendant. The insurance was upon flax, generally from *London* to *Exeter;* and after the wreck, 1-6th of it in quantity was saved, and 1-14th in value. No notice of abandonment was given, but the assured empowered an agent to act for him in saving what could be obtained. In fact therefore this was not a total loss: and though there was a period when the assured, by the wreck of the vessel and the loss of the voyage, might have made it a constructive total loss by abandoning to the underwriter, yet not having done so at the time, it cannot now be treated as a total loss. An abandonment is only not necessary where there has been an actual destruction or loss as to the assured of the whole subject-matter, as in *Mullett* v. *Sheddon* (*b*): but here, where a part has been preserved and has been actually saved by the assured, an abandonment was necessary in order to vest the part saved in the underwriter before he could be liable as for a total loss. If any part of the property exist, the assured has an option whether he will abandon or not, and unless he do elect to abandon, it is only

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an average loss; and was said by the Court in *Mitchell* v. *Edie* (*c*). Now here the plaintiffs having warranted the underwriter free from particular average can only recover, if at all, for a total loss. [Lord *Ellenborough*, C. J. The Court consider that as for so much of the flax which was sunk and never recovered, the plaintiff may recover as for a total loss; but for that part which was saved and subsists in specie, he cannot recover at all by the terms of this policy.] There is no authority to shew that the loss can be so divided. This was one entire insurance on flax valued at 400*l.* If the insurance had been specified to be on so many mats of flax, it might have been different; but as the policy is framed, the warranty for the underwriter to be free from particular average attaches upon the entire subject-matter of the insurance. The subject is touched

(*a*) 7 *East*, 38. (*b*) 13 *East*, 304. (*c*) 1 *Term Rep.* 615.

upon but not decided in *Hamilton* v. *Mendez* (*a*). In *Anderson* v. *The Royal Exchange Assurance Company* (*b*), a part of the corn was so entirely spoiled as to be thrown overboard; and yet an abandonment was held necessary to entitle the assured to recover for any part of his loss. [*Le Blanc* and *Bayley*, Justices, observed that in that case all the corn was preserved in specie and in the possession of the assured, though a part of it was found unfit to be used.]

Lord ELLENBOROUGH, C. J. It was decided in the case of *Anderson* v. *The Royal Exchange Assurance Company*, that in order to constitute a total loss, where the thing insured subsists in specie, there must be an abandonment in time to the underwriters. In that case the assured might have abandoned while the corn remained under water; but they laboured to get it up and preserve it; and [566] when they afterwards did abandon, upon finding that it did not answer to them, it was too late. It had been before held in *Mitchell* v. *Edie*, that an abandonment must be made promptly, if at all; otherwise if part of the goods be saved to the assured, it is only an average loss. Here there was no abandonment; and therefore, under the terms of this policy, which warrants the underwriters free from particular average, the plaintiffs cannot recover unless there was an actual total loss. But how can it be said there was a total loss of the whole, when one-sixth of the flax insured still exists in specie, though deteriorated, in the hands of the assured. As to that part, therefore, he cannot recover. But as to the rest, which was in fact totally lost, there is nothing either in reason or precedent to prevent us from saying that the plaintiffs may recover; for no case has been cited to shew that where the least particle of the thing insured subsists in specie, though the greater part is actually destroyed, the assured shall be precluded from recovering the value of that which is in fact totally lost. Finding therefore no authority against the construction we have already intimated, and the reason of the thing being with it, I consider that the plaintiffs are entitled to recover, as for a total loss, the value of that part which was in fact totally lost; and that they are not entitled to recover for that part which was not totally lost, but still continued to subsist in specie, though deteriorated in value.

The other Judges assenting, the postea was ordered to be delivered to the plaintiffs to enter a verdict for the difference.

(*a*) 2 *Burr.* 1204. (*b*) 7 *East*, 38.

Wednesday, May 6th.

The KING *against* The Inhabitants of ST. MICHAEL in COVENTRY.

The pauper having agreed to commence tenant of premises of the value of more than 10*l.* a-year from the 5th of *July*, when the former tenant was to quit, by permission of the then tenant put in several of his goods in the shop, of which he received the key, on different days before the 25th of *June*, and afterwards worked in the shop: on that day, finding the key of the house in the outward door, he took it, and put some goods in the house by permission of the tenant and landlord, and continued to do the same on different days till the 3d of *July*, when he and his family went to sleep there; the proper tenant having left the house on the 25th of *June*: held that this putting of goods in the shop and house by permission of the outgoing tenant and the landlord, and the going to work in the shop, was no occupation of the premises by the pauper, in the relation of tenant of the premises, before the time when his tenancy was agreed to commence; but that he was removable on the 28th of *June*, when he was actually chargeable to the parish.

STEPHEN MERRALL, his wife, and children, were removed by an order of justices, *on the* 28*th of June*, 1811, from the parish of *St. Margaret* in *Leicester* to the parish of *St. Michael* in *Coventry*, which order was confirmed by the sessions on appeal, subject to the opinion of the Court on the following case.

The respondents proved that *Stephen Merrall* was duly bound apprentice in 1782 to *Ann Goodall* of *St. Michael* in *Coventry*, for seven years, and served her in that parish about five years and a half. Many years afterwards, (viz.) in *October* 1810, he took a house in *St. Margaret*, *Leicester*, of the annual rent of 4*l.* 15*s.*, which he gave up on the 5th of *July* 1811. On the 8th of *April* 1811, he agreed with a Mr. *Bradley* for a house and shop in *St. Margaret*, at the annual rent of 13*l.* 13*s.*, which house was then in the tenure of *Goff*, who was to be tenant thereof to *Bradley* till the 5th of *July* following. The pauper was to commence tenant from the 5th of *July*, and to pay rent from that time. On the 15th of *June*, by permission of *Goff* the then tenant, the pauper put part of a stocking-frame into the said shop, and received the key of the shop from *Goff* for the purpose. On the 17th of *June* he put in the remainder of the frame, and on the 22d and 24th of the same month he put other frames in. On the 25th of *June* the pauper's daughter went to the shop to work, on which day the pauper found the key of the house in the outward door, and took it, and put some goods therein by permission of *Goff* the tenant, and *Bradley* the landlord; and he continued to take articles of furniture to the house, as he went backwards and forwards to work at the shop, from the 25th of *June* until the 3d of *July*, when he and all his family went to sleep there; having slept until that day in the first-mentioned house. *Goff* paid the rent for *Bradley*'s house and shop up to the 5th of *July*, but left the house on the 25th of *June*, and went into an adjoining one. From the 28th of *June* until the removal took place, the pauper continued to receive relief from *St. Margaret's* parish; his wife being ill, on which account he had applied for and received relief from the same

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parish some days before. The pauper was neither tenant of nor occupied Mr. *Bradley*'s house for 40 days, nor did he ever pay any rent for the same.

Vaughan, Serjt. and *Dayrell*, in support of the orders, were stopped by the Court: Lord *Ellenborough*, C. J. observing that it appeared by the case that the pauper was removed before his occupancy of the tenement in *Saint Margaret*'s had commenced, and while he was only in expectation of occupying it in his own right as tenant.

Reader, *Hudson*, and *Marriott*, contrà, submitted that the pauper was at least tenant by sufferance of more than 10*l.* a-year when he was removed, and was therefore not an object of the stat. 13 & 14 *Car.* 2. *c.* 12., which confines the power of removal to persons who shall "come to settle in any tenement [569] under the yearly value of 10*l.*" Here he had *come to settle* upon a tenement of greater value, of which he was let into possession, though his rent had not commenced; which is not material. [Lord *Ellenborough*, C. J. It is material that his tenancy should have commenced, which it had not in this case: he was only in expectation of becoming tenant at a future day. A settlement *by expectation* will form a new head of settlement law.] It is not necessary that there should be a tenancy, in the ordinary sense of the word, in order to satisfy the term "come to settle." *The King* v. *Fillongley* (*a*) shews that the reservation of rent during the period of the occupancy is not material; as *The King* v. *Aldborough* (*b*) shews that it is sufficient if the occupant be let into the possession by the out-going tenant before the expiration of his lease, and without the consent of the original landlord; to whom however the pauper had engaged to pay the rent accruing. If indeed a party occupy a tenement as a wrong-doer, that will not confer a settlement; but any occupation by the permission of the parties interested is sufficient. Nor here the pauper had, by the permission of the out-going tenant, sent in his goods before the 25th of *June*, when he found the key in the door, and took exclusive possession by the consent of the former tenant and landlord; after which he was irremovable.

Lord ELLENBOROUGH, C. J. It is assuming more than the facts of the case warrant, to say that the landlord consented to the pauper's occupation as tenant on the 25th of *June*. The landlord could neither put him in nor turn him out; for another per- [570] son was then the occupier and tenant of the premises. Then the

(*a*) 1 *Term Rep.* 458. (*b*) 1 *East*, 597.

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tenant's leaving the key in the door only shewed his consent to the pauper's putting his goods into the house; and the question is whether a mere liberty of that sort is an occupation. In *The King* v. *Aldborough* there was a tenancy created in express terms; but here the pauper stood in no relation of tenancy to the premises at the time. He never got into the period of his tenancy, but while he was in the house upon an expectation only of becoming tenant, he was removed.

GROSE J. The pauper's occupation as a tenant is expressly negatived by the case.

LE BLANC, J. I do not see how the objection can be gotten over, that at the time of his removal the pauper's interest had not commenced.

Orders confirmed.

Friday, May 8th.

The KING *against* TURNER and Others.

The statute 5 *W. & M. c.* 11. directing by *s.* 2. that no

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certiorari shall be granted on the part of a defendant to remove an indictment for a misdemeanour from the sessions before he shall enter into a recognizance, &c. in 20*l.* to try at the next assizes, &c.; and by *s.* 3. that "if the defendant prosecuting such certiorari be *convicted*, the Court of *K. B.* shall give reasonable costs to the prosecutor, and that the recognizance shall not be discharged till the costs taxed shall be paid; attaches only upon a defendant *convicted* by *judgment;* and therefore if, after a verdict of guilty, the judgment be arrested, no costs can be taxed for the prosecutor.

JERVIS moved in last *Michaelmas* term for a rule to discharge the defendants' recognizance to answer for costs, entered into as required by stat. 5 *W.* & *M. c.* 11. upon their removing an indictment, found at the sessions, for a misdemeanour, into this court, and also to set aside the master's taxation of costs in this case: which rule was opposed by *Gleed* in the same term: and the Court having taken time to consider of their judgment, it was now delivered by Lord *Ellenborough*, C. J. who stated the circumstances of the case, and the authorities cited by the counsel who argued it.

LORD ELLENBOROUGH, C. J. This is a matter which has stood over from *Michaelmas* term last. It was a rule obtained to shew cause why the taxation of costs which had been had in this case should not be set aside. This was an indictment for a misdemeanour, a conspiracy to enter certain preserves of the prosecutor, and destroy his game. The indictment was removed by the defendants into this court by certiorari; and on the trial at the assizes in *Berkshire*, the defendants were found guilty on one count of the indictment, and acquitted on the other counts. A motion was afterwards made in arrest of judgment on behalf of the defendants; and this Court, on argument, arrested the judgment on that count on which the defendants had been found

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guilty. The prosecutor has taxed his costs under the stat. 5 *W. & M. c.* 11 . *s.* 3.; and the defendants have obtained a rule to shew cause why such taxation should not be set aside, on the ground, that the judgment having been arrested, there has not been any *conviction* of the defendants, within the true intent and meaning of the act of parliament. The 2d section of the act enacts that no certiorari, at the prosecution of any party indicted, be hereafter granted to remove any indictment of trespass or misdemeanour, before trial had, from the justices of general or quarter sessions; except by motion in court in term time, or by order of [572] a judge in vacation: and that the parties indicted, prosecuting such certiorari before the allowance thereof, shall find two sureties who shall enter into a recognizance in 20*l.* to appear and plead, and at their own costs and charges to procure the issue joined to be tried. And sect. 3. enacts that if the defendant prosecuting such writ of certiorari be *convicted* of the offence for which he was indicted, then the Court of King's Bench shall give reasonable costs to the prosecutor, if he be the party grieved; which costs shall be taxed according to the practice of the said court: and the prosecutor for the recovery of such costs shall, within ten days after demand made and refusal of payment, on oath, have an attachment granted against the defendant for such his contempt; and that the recognizance shall not be discharged till the costs so taxed shall be paid. Two cases were cited on shewing cause against this rule; *The King* v. *Lyon*, 3 *Burr.* 1461, and the *The King* v. *Finmore*, 1 *Term Rep.* 409. The first of those cases does not apply to this point; for there the recognizance had been forfeited, by the defendant not having proceeded to trial after he had given notice, according to the terms of the recognizance, whereby he became liable to pay costs for not going on to trial; and he had been taken up on an attachment for non-payment of those costs: but afterwards, on trial of the indictment, he was acquitted: and the only question was whether his recognizance and that of his bail should be discharged, till the costs for not going on to trial were paid; he being in custody on an attachment for not paying them. The Court held that the recognizance, having been forfeited, should not be discharged till justice was done by paying the costs. This [575] case, therefore, is no authority as to the construction which ought to be put on the term *conviction* or *convicted*. In the other case, *The King* v. *Finmore*, the defendant had been found guilty on the trial, but had died before the day in bank; so that no judgment could be entered up against him: and the costs having been taxed, and not paid, a rule was obtained, calling on the bail to shew cause

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why their recognizance should not be estreated: which rule was opposed, on the ground that *a conviction* in the stat. of *W.* 3. means a *judgment;* and as there could be no judgment, there was no conviction. But the Court made the rule absolute for estreating the recognizance, on the words of the statute, which says that the recognizance shall not be discharged till the costs so taxed shall be paid. It is to be observed on that case that the defendant had been *convicted* by verdict, *legally* convicted, and on a good and sufficient indictment, as far as appeared to the Court; for no objection was made to the sufficiency of the charge against the defendant, and nothing but the death of the party between the verdict and the day in bank prevented that verdict from being followed up by judgment. In the case now before the Court, judgment having been arrested, it appears that the defendant has not been guilty of any offence against the law; that he has not been convicted or found guilty by the jury of any offence which the law recognizes as such: he cannot, therefore, be considered as a guilty person; much less ought to be mulcted with costs for having removed a bad indictment from an inferior jurisdiction into this court. On these grounds we are of opinion, that within the meaning of this act of
[574] parliament, these defendants are not to be considered as *convicted* of the offence for which they were indicted; and that, in consequence, the rule for setting aside the taxation of costs must be made absolute.

Rule absolute (*a*).

(*a*) See 1 *Hale, P. C.* 686, where Lord *Hale,* commenting upon the stat. 5 *Eliz.* c. 14. against the forging or making of false deeds, &c. by which a person committing a second offence after his "*conviction* or condemnation of a former one, shall be deemed guilty of felony without benefit of clergy; has these words: "By *conviction* I conceive is intended, not barely a conviction by verdict, where no judgment is given; but it must be a *conviction* by *judgment.*"

Friday, May 8th.

TRASK *against* FRENCH, Clerk.

Where a plaintiff is put to declare in prohibition, and is nonsuited at the assizes, the defendant is only entitled to his single costs under the stat. 8 & 9 *W.* 3. c. 11. *s.* 3., and not to double costs under the stat. 2 & 3 *Ed.* 6. c. 13. *s.* 14. which latter only applies to cases where the party who is hindered of his suit in the ecclesiastical court by the prohibition acquiesces in it; and then the party obtaining it must within six calendar months verify his suggestion by the depositions of two witnesses in the court which granted the prohibition; otherwise the party hindered shall have a consultation and double costs and damages.

UPON a rule obtained on behalf of the defendant, in a suit in prohibition for a consultation and double costs under the stat.

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2 & 3 *Edw.* 6. *c.* 13.; which was argued in last *Hilary* term (*a*) by *Dampier* against the rule, as far as it respected double costs, and by *Burrough* in support of it; the Court took time to advise; and now

Lord ELLENBOROUGH, C. J. delivered the judgment of the Court.—This was an application to the Court, on the part of the defendant, for double costs. The plaintiff obtained a prohibition in a suit for tithes instituted against him by the defendant. The ground of the prohibition was a modus. There was a declaration upon that prohibition; issue was joined upon the modus; and at the [575] trial the plaintiff was nonsuited; and the claim for double costs is founded upon the stat. 2 & 3 *Edw.* 6. *c.* 13. *s.* 14. By that statute it is provided that in case the suggestion be not proved true by two honest and sufficient witnesses at the least, *in the court where the prohibition shall be granted,* within six months next after it is so granted and awarded, then the party, who is hindered of his suit in the ecclesiastical court by such prohibition, shall upon his request and suit, without delay, have a consultation granted in the same case in the court where the prohibition was granted, and shall *also recover double costs* and damages against the party that pursued the prohibition, to be assigned or assessed by *the Court where the said consultation* shall be so granted; for which costs and damages that party shall have an action of debt, &c. This statute, therefore, professes to give the double costs where the *defect of proof* is *in the Court* which granted the prohibition, and, as it should seem, where a consultation is granted *for such defect:* but it does not follow that the defendant is entitled to them in those cases in which he obliges the plaintiff to declare in prohibition, and makes the matter triable *by a jury,* and in which he does not obtain his consultation for want of proof *in the court above within the six months,* but by a mode of proceeding which entitles him specifically to single costs under the statute 8 & 9 *W.* 3. *c.* 11. *s.* 3. Where a prohibition is granted upon the suggestion of facts, the party prohibited may require the plaintiff to declare in prohibition, and may put in issue for a trial by jury the matters upon which the prohibition is granted; but if he do not think fit to incur that expence, he may acquiesce in the prohibition; and then it is the duty of the party who obtained it to give [576] proof of the suggestion in the court which granted the prohibition, within the six calendar months. Proof by depositions before the Court, or a judge of the court, is the ordinary course, (see

(*a*) I was not present in court when the case was argued.

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Co. Ent. 462, 3, 4.) that there are many instances, in the books, of consultations for want of such proof. The last I have met with is in *Trin.* 4 *Ann. Foy* v. *Lister*, 2 *Ld. Raym.* 1171.; *Salk.* 554.; and this is a strong authority against the present application: for, according to Lord *Raymond*, though the consultation was granted, the Court refused to make it part of the rule, that the defendant should have his double costs and damages according to the statute, and said he "must have them of consequence;" that is, they would be assigned by the Court *as part of the judgment*: so that if they were *unduly* assigned, viz. in a case in which by law the defendant was not entitled to recover them, it would be error upon the record. When the consultation is for this defect, it is no bar to a second prohibition for the same cause, as a consultation is where it is upon the merits. (See *Carth.* 463. *Cro. Car.* 208.) Where the plaintiff is put to declare in prohibition, the stat. 8 & 9 *W.* 3. *c.* 11. *s.* 3. provides for costs both for the plaintiff and defendant: and, as it seems to us, it is only where the party prohibited does not put the plaintiff to declare, and where the ground of the consultation is the want of proof in the Court which granted the prohibition within the six months, that double costs can be claimed under the stat. of *Ed.* 6. We are of opinion, therefore, that this rule must be discharged, as to so much thereof as prays a taxation of double costs.

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Wednesday, May 6th.

The KING *against* The Justices of GLOUCESTERSHIRE.

Whether a person, *not having* "holy orders," (*i. e.* by episcopal ordination,) or "pretended holy orders," (*i. e.* conferred by some form other than episcopal ordination, acknowledged by Protestant dissenters,) but being a candidate only for holy orders of one or other description, be entitled to require of the sessions to have the oaths administered to him, and to be allowed to make and subscribe the declarations required by the 8th section of the toleration act 1 *W. & M. c.* 18., within the further description in that section of a person "pretending to holy orders," to enable him to preach, &c. without incurring penalties; or whether these words are to be understood only of a person pretending actually *to have* some description of holy orders; at any rate it is not necessary that a person bringing himself within the true meaning of "pretending to holy orders" should also be the teacher or preacher of a separate congregation of Protestant dissenters: and the sessions having refused to admit a person to take the oaths, and make and subscribe the declarations, &c. because he had not the conjoint qualification, this Court granted a mandamus to them to administer to him the oaths, &c. or to enable them to make a special return of the grounds of their refusal.

THE question in this case arose upon the construction of the 8th section of the toleration act 1 *W. & M. c.* 18., and came on upon a rule granted in the last term, calling on the justices of the peace for the county of *Gloucester*, to shew cause why a mandamus should not issue, commanding them, at the next general or quarter sessions of the peace holden for that county, to administer to *Thos. Standfast Brittan* the oaths mentioned in the said statute, and to permit him to make and subscribe the declarations and articles in the same statute mentioned, as a person *pretending*

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to holy orders. This rule was obtained upon Mr. *Brittan*'s affidavit; in which he swore that he is and was on the 14th of *January* 1812 a person dissenting from the church of *England*, and that he did then and doth now live at *Pratten's Row* in the county of *Gloucester*, and that he was then and now is a person *pretending to holy orders.* That on the said 14th of *January* he appeared before the justices of peace assembled at the quarter sessions for that county, and informed them of his name and place of abode, that he was a person dissenting from the church of *England*, and a person pretending to holy orders; and tendered himself to take the oaths, and to make [578] and subscribe the declarations, and to declare his approbation of, and to subscribe the articles of religion referred to in the 8th section of the toleration act 1 *W. & M. c.* 18.; and then and there required the said Court to administer or permit to be administered the said oaths to him, and to permit him to make and subscribe the declarations and articles before mentioned, and which he was then and now is ready, willing, and desirous to take, make, and subscribe. That the justices then and there present refused his application; assigning as their reason for such refusal, that they had been informed that a determination had been made by the Court of K. B. that no person pretending to holy orders was entitled to take the said oaths, and to make and subscribe the said declarations and articles, *unless he was also and at the same time the teacher or preacher of a separate congregation of dissenting Protestants:* and that the said justices assigned no other reason for such refusal to the deponent, nor to any other person in his hearing or to his knowledge. There was a further affidavit by the deputy clerk of the peace of the same county, that, upon hearing Mr. *Brittan*'s application to the sessions, a question was put to him by the Court, whether he had any particular congregation, or whether he was then appointed the teacher or preacher of any particular congregation of dissenting Protestants; and on being answered in the negative, the Court declined to administer to him the oaths, or to permit him to make and subscribe the declarations and articles mentioned in the toleration act.

The Attorney-General and *Abbott* now shewed cause against the rule for the mandamus. The question arises upon the toleration act 1 *W. & M. c.* 18. *s.* 8., which enacts "that no person dissenting [579] "from the church of *England in holy orders*, or *pretended holy* "*orders*, or *pretending to holy orders*, nor any *preacher or teacher of* "*any congregation of dissenting Protestants*, that shall make and "subscribe the declaration aforesaid, and take the said oaths at "the general or quarter sessions, &c. where such person lives,

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" (which Court is hereby empowered to administer the same,) and " shall also declare his approbation of and subscribe the articles of " religion, &c. except, &c. shall be liable to any of the pains or " penalties mentioned in the statutes 17 *Car.* 2. *c.* 2., 22 *Car.* 2. " *c.* 1., and 13 & 14 *Car.* 2. *c.* 4." It cannot be contended that every person is entitled to come in and require to take the oaths, otherwise the act would not have particularized different descriptions of persons who were so entitled. At this distance of time from the controversies of those days, it is difficult to ascertain the exact meaning of some of the terms in the act, used to describe the persons intended to be privileged; and of these, the "pretending to holy orders" is not the least difficult. It cannot be imagined that the legislature, or even the body of dissenters themselves, at that period, meant to be satisfied with a bare declaration from an individual that he pretended to holy orders, without shewing some reasonable ground for such his pretension; some facts from whence the Court could judge that his pretension was admitted by dissenters of the same persuasion whom he was to teach or preach to. The toleration act had in view two distinct classes, those who merely attended at dissenting meetings, who are provided for in the former part of the act; and those who officiated at such meetings as ministers, for whom it meant to provide by
[580] the 8th section, who are required to do more than the others, and to whom it extends different exemptions from penalties under three former acts, namely, the act of uniformity, 13 & 14 *Car.* 2. *c.* 4., the five-miles act. 17 *Car.* 2. *c.* 2., and the conventicle act, 22 *Car.* 2. *c.* 1. The first and last of these acts are levelled against officiating ministers who have not conformed, or against teachers or preachers unlicensed and not conforming; and no dissenting minister is entitled to be relieved under the 8th section of the toleration act, who has not actually officiated as a teacher or preacher. The words of the stat. 17 *Car.* 2. are indeed more general, and introduce for the first time the description of persons "*pretending to holy orders;*" but it plainly appears from the preamble of that act, and from the history of the times (*a*), that it was intended to apply to officiating ministers who during the usurpation, had neglected to comply with the rites of ordination required by the canons of the church, and to such as should there-

(*a*) *Hume* (vol. 7. p. 384. and 408.) says that in 1662, that is after the passing of the act of uniformity, two thousand of the clergy relinquished their cures: and that the five-miles act, in 1665, was to prevent a dissenting teacher who does not take the oaths, &c. from coming within five miles of any corporation, or of any place where he *had preached*, after the act of oblivion.

after refuse to conform to such rites. *Holy orders* then meant genuine orthodox holy orders; *pretended holy orders* meant such holy orders as were conferred by the presbyterian church, without episcopal ordination or the imposition of hands by the bishop; and the words, "*pretending* to holy orders," were added in order to prevent evasion by persons who, though they pretended and assumed to be in genuine holy orders, or in such holy orders as were not conferred in a way which the church of *England* considers to be regular, and therefore called *pretended holy orders* in the act, could not be proved to have had any holy orders at all: and this descrfption was introduced to facilitate the proceeding against offenders of that description, by superseding the necessity of proving more against them than the fact of their own pretension by the very act of officiating as ministers. The stat. 17 *Car.* 2. includes also a fourth description of persons, namely, those who shall in fact preach under the circumstances forbidden. [Lord *Ellenborough*, C. J. In *Cator*'s case (*a*), in the 34 *Car.* 2., who was committed upon that act, and brought by habeas corpus before this Court, exception was taken, that it was not shewn in the return that he had preached since the act of oblivion; and if not, that he was not within the act. But upon reading the act, it is said that three of the justices (*Pemberton*, C. J. hesitating,) were of opinion that any person in *pretended orders*, or *pretending to have orders*, was within the statute. He was, however, finally discharged upon another ground.] At all events if there be any uncertainty in the terms *pretending to holy orders*, no better rule of construction can be adopted than that which is to be gathered from other acts in pari materiâ. Now by the stat. 19 *Geo.* 3. *c.* 44., which was "for the *further relief* of Protestant dissenting ministers and schoolmasters," the legislature, with the assent, as it must be presumed in fact as well as in law, of the dissenters themselves, for whose benefit it was intended, thus describe the persons who were entitled to the benefit of the 8th section of the toleration act, "Every person "dissenting from the church of *England*, in holy orders, or pre- "tended holy orders, or pretending to holy orders, *being a teacher* "*or preacher of any congregation of dissenting Protestants*," &c.; and to such persons taking certain oaths and making and subscribing certain declarations, it extends the benefits and the exemptions from the disabilities of that and the subsequent act of the 10 *Ann.*, and also privileges them from serving in the militia. The reasonableness of this construction is strongly in favour of it; it is most

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(*a*) *Skin.* 80.

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important to the body of dissenters themselves, that there should be some check upon the self-assumption of the clerical character amongst them, and that a person's pretension to holy orders should be stamped with the approbation of some dissenting congregation, evidenced by their choosing him to be their preacher or teacher. Neither the dissenters themselves, nor the legislature, could have meant to exempt from disabilities, or extend clerical privileges to, every fanatic enthusiast, who, without learning or sense, or the approbation of any of their own body, should pretend to have a call from heaven to instruct mankind. It is not reasonable or decent that any person should be publicly privileged as a clerical character, to teach others their duty, without its first appearing, to the satisfaction of those who are to admit him to such a privilege, that there is in fact some body of dissenting Protestants who are desirous of being so instructed by him. But supposing the Court could not look to the act of the 19 *Geo.* 3. as putting a construction upon the description of persons entitled under the 8th section of the toleration act, the *holy orders* described in that act, to which the claimant *pretends*, must mean *something;* some outward act, ceremony, or institution: it cannot mean a mere suggestion or assumption of his own mind, a claim by inspiration,
[583] without the intervention of human means; he must have done some act or entered into some engagement with others in order to found his *pretension* to holy orders; he must look to receive those holy orders elsewhere than from himself; they must be communicated to him from others by some act or ceremonial. It is therefore necessary and reasonable that when he applies to take the oaths and subscribe the declarations as a person *pretending to holy orders*, he should give reasonable evidence how he pretends. If a person claim to be admitted to a lay office, it is not enough for him, upon an application for a mandamus to those whose province it is to admit him, to swear that he claims to be such an officer, *e. g.* a burgess of a corporation, but he must shew upon what grounds he claims it. It may be said that no person is entitled to be admitted to any office unless he be strictly entitled to it a priori, but that the *pretending* to holy orders is sufficient in this case to be admitted ex gratiâ. Still it must be a bonâ fide pretension; it is not enough to *say* that he does *pretend;* he should shew how, that the sincerity of his pretensions may be judged of. Holy orders, though they invest the person with a sacred function, must necessarily be conferred by human authority; and whether the claimant has been already delegated to exercise the function, by whatever form it may be admitted by the sect to which he belongs; or

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whether he is only in progress to *receive* holy orders by entering upon some previous course of discipline; his state and condition is equally capable of proof, to satisfy the Court that the claimant's pretensions are real, and that he neither deludes them nor himself. Supposing therefore, that the sessions did wrong in rejecting the claimant, because he was not actually a teacher or preacher of a separate congregation; yet as he neither offered any evidence then nor now, except his own assertion, that he was a person *pretending* to holy orders, the Court will not grant the mandamus, as every person claiming the benefit of this writ must shew expressly that he is entitled to it.

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Topping, contrà, (with whom were *Gurney*, *Denman*, and *Brougham;* but the Court thought it unnecessary to hear the argument in support of the application throughout.) The words "*pretending to holy orders*," mean nothing more than a candidate for holy orders, and are one description of persons who must have been well known at the time when the toleration act passed, which was drawn by that great lawyer and statesman Lord *Somers*, who was perfectly acquainted with the history of his country; and the same was recognized as a distinct description of persons included in the 8th section of that act by *Le Blanc*, J. upon a late application of this sort against the justices of *Denbighshire* (*a*); though the application there was in another character, as a preacher to dissenting congregations; which application the Court thought could not be sustained, without shewing that he had a separate congregation of his own; but that a party *pretending to holy orders* was entitled to be received to take the oaths, &c. without being the teacher or preacher of a separate congregation. The present applicant therefore was refused by the sessions upon a mistake of the former decision. It is now objected, however, that whatever reason they may have given for their rejection, yet this Court will not grant the mandamus, unless the applicant bring himself within the law: but he does so, primâ facie at least, by swearing that he *pretends to holy orders;* and this has always been deemed sufficient in practice. Upon any other construction of the toleration act, one or other of these inconveniences must ensue; either that no dissenting minister could in the first instance qualify himself according to law, but must first be guilty of a breach of the statutes against nonconformity, by teaching or preaching without a licence, or the congregation of dissenters must elect a person to be their minister, (for with them it is an elective office,) without any experience

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(*a*) 14 *East*, 288.

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of his qualifications for the ministry: it would be saying that there should be no initiation or probation for the office, but that he must go to it per saltum. Besides, what mischief can ensue from the construction contended for? It is objected that he applies for a licence which is to give himself immunities and exemptions: but that is not so; the licence does not confer the character of dissenting minister upon him; it is only a testimonial of his loyalty and faith in having taken certain oaths and made certain declarations, without which he would have subjected himself to penalties in the exercise of his clerical function; but it would be no proof of any previous qualification of the party in any proceeding in which he was endeavouring to avail himself of any immunity attached to the character. He was then stopped by the Court.

Lord ELLENBOROUGH, C. J. We not only have no occasion to enter into the question which has been raised, as to the meaning of the act, respecting the alleged qualification of "pretending to holy orders," but we cannot properly decide it upon this application. This person applied to the sessions, and tendered himself to take the oaths, and to make and subscribe the declarations, &c. mentioned in the toleration act, upon the ground of his being within one of the descriptions of persons mentioned in
[586] the eighth section of that act, that of a person "*pretending to holy orders.*" The objection then taken by the justices, and upon which they refused his application, was not that he did not truly describe himself as a person *pretending to holy orders*, but (upon an erroneous supposition that this Court had so decided it,) that such qualification alone did not bring him within the description of the statute, unless he were also the teacher or preacher of a separate congregation of dissenting Protestants. But if the Court be not now prepared to say that the several qualifications required by the statute are to be understood in a copulative sense, it is needless to consider the question further, inasmuch as the magistrates have not denied that he bore the character in which he presented himself to them, as a person *pretending to holy orders*, and which he now swears to, but have only refused him as not having had the conjunct qualification of pretending to holy orders, and also being a teacher or preacher of a separate congregation; when it appears that these are descriptive of different classes of persons, all of whom are substantially entitled to the protection of the statute, where the parties applying bring themselves fairly within the meaning of either of the descriptions used by the legislature. The mandamus, therefore, must at all events go, in order to correct this mistake into which the magistrates have fallen. But

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what is the meaning of "pretending to holy orders;" whether it can in reason be understood to mean any thing more than pretending *to have* holy orders; and whether this person brings himself within that description, it will be for the magistrates to consider, and if * they choose so to do, to put the question into a course of decision upon the record, by making a special return to the writ: and if they shall adopt the construction put in *Cator*'s case upon the words "pretending to holy orders," and return that he was not a person pretending *to have* holy orders; and further, that he had not holy orders, or pretended holy orders; or if they should by their return only negative the fact of his pretending to holy orders, or to have holy orders of any description; the party applying may either object upon the matter of law to the special return, and move to quash it as insufficient; or bring an action for a false return, if he shall think it false in fact. The question may thus be put upon the record, and carried to the highest tribunal. Before I conclude I will just state what has been said by some of our predecessors upon former applications on this statute. In 6 *Mod.* 310. upon a motion for a mandamus to the justices of *Warwickshire* to admit one *Peat* to take the oaths and subscribe, &c. according to the toleration act, in order to be qualified to teach a dissenting congregation, Lord C. J. *Holt* said that "the party ought to suggest whatever is necessary to entitle him to be admitted; and if that be not done, or if it be done, and the fact be false, that will be good matter to return." The same thing in effect was said by Lord *Mansfield* in the case of *The King* v. *The Justices of Derbyshire*, reported in 1 *Blac.* 606., and full as well reported in 4 *Burr.* 1991.; where he observed, upon an application for a mandamus to the justices to register and certify a dissenting meeting-house, that "no inconvenience could attend the registering it; for the registry and certificate do not prove that they are within the act: they will still be obliged to shew that they are within the requisite qualifications, if called upon, notwithstanding the register and certificate. And if in fact they are not within the qualifications, the justices may return that they are not, if they think proper so to do." In this case, therefore, let it be distinctly understood that the party applied to the sessions as coming under one specific description in the toleration act, as a person *pretending to holy orders*; that the justices at sessions did not deny or enter into any examination in fact of the ground on which he maintained that pretension, and whether he brought himself within the fair meaning of those terms in the act; but assuming that he did pretend to holy orders, they put

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their refusal of him upon another ground, that he was not also a teacher or preacher of a separate congregation of Protestant dissenters; conceiving that such had been the determination of this Court in a late case; in which they were certainly mistaken. His allegation, therefore, which he made at that time, has not been traversed, and we now give them the opportunity of traversing it, if they think proper, by making a special return in the manner before suggested; and then the validity of that return may either be discussed upon a motion for a peremptory mandamus; or if the return should be sustained, its truth and validity may be questioned in an action for a false return. Upon these grounds, therefore, without expressing at present, because it is not necessary, whether a person "pretending to holy orders" must not in all sense and meaning be understood to be a person pretending *to have* or be in the actual possession of holy orders: without deciding this, I will refer claimants of this description, who *are merely candidates for holy orders*, or *persons*, in this *sense, pretending* to *holy orders*, to a consideration of these matters as they appear
[589] to have been understood in the time of the troubles. The title of the fifty-second statute in *Scobell's Acts*, printed in 1658, p. 92. is "None may preach but ordained ministers, except such as, intending the ministry, for trial of their gifts, *be allowed* by such as *shall be* appointed by both houses of parliament;" which clearly does not mean a general and indefinite allowance to preach in respect of a self-designation for that purpose; but they are to be sanctioned by the previous allowance of persons constituted by the authority of both houses for the purpose of giving that allowance. It may also be worth the while of those who, not having holy orders or pretended holy orders, argue that a self-pretending to holy orders is alone a sufficient authority to preach, to look into those ordinances in order to see what qualifications were then expected in persons before they were allowed to preach the word of God. They are thus described in page 80 of *Scobell's Acts*, "It is presupposed (according to the rule for ordination,) that the minister of Christ is in some measure gifted for so weighty a service by his skill in the original languages, and in such arts and sciences as are handmaids unto divinity, and by his knowledge in the whole body of theology." Such was the preparation required even in those times in which enthusiasm is supposed to have been at its greatest height, and literature at its lowest ebb: and, such, it appeared fitting to those who conducted the government in that perturbed period, should be the qualifications of those who were candidates for ordination as ministers. These matters may be the

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subject of further consideration, when this question shall come again before the Court: but at present we think that this mandamus cannot be resisted, because the right in which this person applied has not been denied to exist, or drawn in question* by the magistrates at the sessions; and the magistrates will now have an opportunity of making a special return of the grounds of their refusal to do the acts required, if they shall think fit.

Per Curiam, Rule absolute (*a*).

(*a*) See the next case.

The KING *against* The Justices of SUFFOLK (*b*).

Friday, May 8th.

THIS case arose out of another application upon the 8th section of the toleration act, 1 *W. & M. c.* 18. which was made by Mr. *Ellington,* a dissenting minister, to the justices of *Suffolk* in sessions, to be admitted to take the oaths and make and subscribe the declarations thereby required; which claim was made and offered to be sustained by him upon his oath, as being the teacher of a congregation of dissenting Protestants, assembled at *Mildenhall* for above six months past; and was refused by the justices, without any imputation against the fitness of the individual, upon his advisedly declining to comply with a general rule which they had made and promulgated in sufficient time before, requiring every person of this description to authenticate his claim by producing a certificate from two of the congregation by whom he was appointed, certifying such his appointment. In consequence of this refusal a mandamus was applied for on the part of Mr. *Ellington,* as such teacher, &c., similar in form in other respects to that which was granted in the last case; and his application was supported by his own affidavit (and those of others) of the fact of his being the teacher of a certain congregation of Protestant dissenters, consisting of 70 or 80 persons, meeting at *Mildenhall,* &c. which place of meeting was duly registered.

The *Attorney-General* and *Dampier* shewed cause in the last term against the rule for the mandamus, which was supported by *Topping, Gurney,* and *Brougham.* In addition to some of the general arguments which were used in the last case, the reasonableness and general convenience of the regulation prescribed by the justices of *Suffolk,* as the most easy and satisfactory mode of authenti-

Under the toleration act, 1 *W. & M. c.* 18. *s.* 8., the justices in sessions have no authority to require of a person claiming to take the oaths and to make and subscribe the declarations, &c. therein mentioned, as a teacher of a separate congregation of Protestant dissenters, and to verify the same claimed upon oath, that he should produce a certificate from two of his congregation, authenti-

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cating such his appointment, in compliance with a general rule before made at the sessions for that purpose.

(*b*) See the last case.

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cating the claim of the teacher or preacher, without the irksome necessity of weighing the claimant's evidence in his own behalf, was urged on one side, and denied on the other. By the latter it was stated, either as an infringement of the toleration act, by superadding a further qualification than is required by that statute: which, it was said, if the sessions could do in one particular, they might in many others: or treating it as a special rule of evidence which they had laid down to guide their own consciences as to the truth of the fact certified, it was contrary to the general policy of the law. And it was further contended in this case that the duty of the sessions was merely ministerial, to admit the applicant to take the oath, and make and subscribe the declarations, &c. upon his swearing that he is a person within either of the descriptions mentioned in the toleration act.

There being other cases of the like description then to be argued, particularly the case of the justices of *Gloucestershire*, the last reported, this was ordered to stand over for further consideration till those cases had been argued. And now the opinion of the Court upon the present application was delivered by

[592] Lord ELLENBOROUGH, C. J. This was a motion for a mandamus to administer the oaths under the toleration act, and the Court forbore giving judgment till after the argument in the case of *The King* v. *The Justices of Gloucestershire* should be disposed of. The Court having yesterday decided upon that motion, and being of opinion that the justices in this case had no right to require of the party applying, the certificate which they did require, this rule for a mandamus must also be made absolute.

GEE *against* LANE.

Friday, May 8th.

A *joint* warrant of attorney given to enter judgment upon a *joint and several* bond, will not authorize the entering up judgment against the survivor only.

THE defendant *Lane*, and one *William Gee*, gave their *joint and several* bond, dated 15th of *October*, 1808, to the plaintiff, *Thomas Gee*, in the penal sum of 2400*l.* for payment of 1180*l.* and interest, by instalments; and also executed a *joint* warrant of attorney for the same date, whereby they authorized the attorney "to appear for *us John Lane* and *William Gee*, and to receive a declaration for *us* in *an action* of debt for 2400*l.* upon a certain bond, bearing even date herewith, whereby the said *J. L.* and *W. G.* are *jointly and severally* become bound to the said *Tho. Gee* in the penal sum of 2400*l.* and thereupon to confess the same ac-

tion, or else to suffer judgment by nil dicit, &c. to pass against *us* in the said action," &c. And now, *after the death of Wm. Gee,* 1812.

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Abbott moved for leave to enter up judgment on this *joint* warrant of attorney against the surviving party *Lane* only. He cited *Gladwin* v. *Scott*, (*a*), where a *joint bond* having been given, and a warrant of attorney to enter judgment against *me*, (not *us*,) though executed by the *two*, the plaintiff had leave, upon the common affidavit to enter judgment against the survivor. And a case of *Todd* v. *Todd* (*b*) was referred to, where the warrant of attorney having been given *to* two, and one having died, leave was given to the survivor to enter judgment. And in *Tidd's* Book of Practice (*c*), it is laid down generally, that where there are several parties, and one of them dies, before judgment, it may be entered by or against the survivors.

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Lord ELLENBOROUGH, C. J. "*An action*, to be brought against *us*," must mean a *joint* action. In the case cited the warrant of attorney executed by the two was to enter judgment against *me*, which, construed severally, might serve the purpose: but I am afraid that an authority by two to enter judgment in an action against *us* will not warrant a judgment against one alone. The authority must be pursued: we cannot violate it.

Per Curiam, Motion denied.

(*a*) *Barnes*, 53. (*b*) In *B. R. Barnes* 48. and 1 *Wils.* 312.
(*c*) P. 466. in edit. of 1799.

The KING *against* The Justices of DORSET and Others (*a*).

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Friday, May 8th.

W. P. TAUNTON moved, on behalf of the inhabitants of *Winborne* in *Dorsetshire*, for a writ of prohibition to be directed to the justices of that county, and to *John Dyson*, the surveyor of the county bridges, and to *Jesse Bushrod*, a contractor, to stay a nuisance which the relators complained of, in the demolition of a public county bridge in the king's highway, in the parishes of

The justices of *Dorset* having, under the stat. 43 *Geo.* 3. c. 59., contracted for the building of a new bridge in a different site, in lieu of the old one, which was ruinous; and having directed the old bridge to be taken down before the new one was passable, for the benefit of the old materials to be used by the contractor in finishing the new bridge; this Court refused a writ of prohibition to them, to restrain them from pulling down the old before the new bridge was passable; though there were strong affidavits of the inconvenience and loss to be sustained by the neighbourhood in being obliged to use a round-about way in the interval; referring the complainants to the ordinary remedy by indictment, if the pulling down the old bridge, under these circumstances, were a nuisance; and seeing no occasion to interfere by applying a prompt remedy of a novel kind in modern practice.

(*a*) I was favoured with this note by Mr. *W. P. Taunton*.

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Great Canford and *Wimborne Minster*, called *Canford-bridge*. He endeavoured to establish two points; first, that this was a nuisance; secondly, that the Court could grant a festinum remedium under the circumstances, by a writ of prohibition. The affidavits upon which he made this application stated that *Canford-bridge* being considerably injured by a flood in *April* 1809, was soon after put into substantial temporary repair, and rendered passable and useful; but that the county surveyor reported to the justices that it was expedient to build an entire new bridge in lieu of the old one; upon which the sessions made an order for building a new bridge (*a*) upon a site about 60 yards from the former; and under their authority a contract was made between the clerk of the peace and county surveyor on the one part, and *Bushrod* and another on
[595] the other part, for building a new bridge, and taking down the old one. That an advertisement was afterwards, in *March* 1811, published by the county surveyor, announcing that in *April* following the bridge would be taken down; but upon a remonstrance on the part of the relators to the sessions, that design was postponed. That when the piers of the new bridge were nearly finished, the contractors finding themselves unable to complete their contract, were discharged from it by the sessions, and another contract was made with *Bushrod* for building and completing the new bridge; and another contract was made, either with *Bushrod* or *Dyson*, for taking down the old bridge. That in *March* 1812 another public advertisement appeared, announcing that the old bridge would be stopped in the ensuing month, and *Dyson* and his workmen had actually begun to obstruct the highway at the avenue to that bridge, by putting posts and rails across it, which the relators had first peaceably removed as a public nuisance; upon which the parties consented to suspend their proceedings till a further remonstrance could be made to the sessions, holden on the following day, the 7th of *April* 1812; when it was again submitted to the justices that the old bridge should not be removed until the new one was erected: but that the justices still ordered *Dyson* to proceed with his contract; and at the time of making the present application he had removed the gravel and soil from the surface of the old bridge, taken down the parapet walls, and broken up the crown of two arches. It was sworn, however, on the part of the relators, that this damage might be repaired, and the bridge again rendered passable, for a sum of 300*l.* while the new bridge was estimated to cost 15,000*l.* It was further sworn, by nine per-

(*a*) See the stat. 43 *Geo.* 3. *c.* 59. *s.* 2.

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sons of experience, that there was no necessity for the demolition of the old bridge; that the temporary repairs done in 1809 were such as to render the bridge perfectly safe and passable for the present; and it would, but for the demolition, have continued so for several years to come. That the new bridge, which was situate 60 feet higher up the stream, might be completed, if sufficient materials were brought, without any obstruction from the old bridge; and, on the contrary, the carriage of materials would be thereby facilitated; that there was time to collect materials from other quarters sufficient for the work before they would be wanted, so that no delay would be occasioned by the old bridge continuing; and that instead of paying *Dyson* 500l. under the existing contract for pulling it down, for the sake of the materials, other persons would have given 200*l.* for the materials, and have taken the bridge down at their own expense, at a saving of 150*l.* to the county. It was also sworn that the old bridge was in the main road from *London* to *Poole*, between which latter and *Wimborne*, *Cranborn*, and the neighbouring country to the north, north-east, and north-west, there was a great traffic and passage over the bridge: and that there was no present substitute for the bridge, the river being there rapid and not fordable, nor any ferry over it; and no other way from *Poole* to *Wimborne*, except either by going five miles about, or by going a mile about over *Julian's* bridge, and through by-roads: that *Julian's* bridge was steep and narrow, and very dangerous and inconvenient, especially for carriages laden with timber, of which a great quantity was used to pass over the old bridge; and the by-roads were bad. That by the contract *Bushrod* was to complete the new bridge by the 30th of *November* instant; and if he fulfilled the contract strictly, the public would [597] be deprived of this passage for eight months, from the beginning of *April* to the end of *November;* but from the little progress hitherto made in the work, there was little prospect of its being completed within that time; and even, if completed, time would be required for the new made ground at each end to settle during the winter. But it was calculated that before *November* only, the inhabitants of *Wimborne* and the vicinity would lose in their increased length and expense of carriage of goods not less than 1200*l.*

Upon these facts, *Taunton* contended, that the destruction of the old bridge was premature and unnecessary, and therefore was a nuisance. The stat. 43 *G.* 3. *c.* 59. was to receive a reasonable interpretation: and though *s.* 2. directs that where any bridge shall be so much in decay as to render the taking the same wholly

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down necessary or expedient, it shall be lawful for the justices in sessions to direct *the same to be rebuilt*, either on the old site or situation, or on any new one more convenient to the public, it did not give the justices any jurisdiction or discretion to take down the old bridge before it was necessary. Their power before this statute extended only to taking down a bridge when it became necessary; and this act did not enlarge their power. Where indeed the bridge was to be rebuilt on the same site, it was necessary to take it down before a new one could be made; but here no such necessity existed. Statutes in *pari materiâ* are to be expounded by each other; and the stat. 13 *G.* 3. *c.* 78. after giving to justices the power of diverting roads in certain cases, enacts (*s.* 17.) "that when any such new highway shall be made, the old highway shall be stopped up, and the land sold, and the money *arising therefrom applied towards the purchase* of the land where such new highway shall be made;" a provision which, if literally complied with, would leave the public, during the interval between the sale of the old and the purchase of the new line of road, without any way at all. But the Court, attending to the reason of the thing, and the public convenience, decided in *Page* v. *Howard* (*a*), and *Welch* v. *Nash* (*b*), that until the new was completed the old highway could not be stopped up. If the justices had authority to suspend the passage of the public over this bridge for six months, they might equally do so for as many years. The Court may exercise this jurisdiction, either considering the parties as individuals guilty of a nuisance, or considering it as an unauthorized act of the quarter sessions; which, according to the first resolution in *Bagg*'s case (*c*), does not oust this Court of its superintending jurisdiction. To this Court belongs authority not only to correct errors in judicial proceedings, but other errors and misdemeanors extrajudicial. So, though persons pretend to be a court who are no court, prohibition lies. In *Chambers* v. *Jennings* (*d*) where *Holt*, C. J. denied the existence of such a Court as the Court of the Earl Marshal alone, yet he awarded prohibition to him to hold plea of words. So prohibition went to the Court of quarter sessions, which exceeded its authority in trying an information for usury. *Pamfray*'s case, *Litt.* 163. If justices of peace take upon them more jurisdiction than they are allowed by law, prohibition lies. Secondly, Though this remedy by prohibition in case of nuisance has not been in use of late years, it is recognized

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(*a*) *Cald.* 228.
(*b*) 8 *East*, 225.
(*c*) 11 *Rep.* 98.
(*d*) 7 *Mod.* 125.

in the books; and in a case like the present, where the mischief is very considerable and urgent, the Court will * apply as prompt a remedy as the law will supply: and this writ seemed formerly to have been very extensively applied. Prohibition lay at common law to tenant in dower, tenant by the curtesy, and guardian, to restrain waste. 2 *Inst.* 299. 305. *Com. Dig. Waste*, A. 1. So prohibition lies to a parson or other ecclesiastical person to stay waste pendente placito of quare impedit; which is clear law at this day. *Hob.* 36. *Com. Dig. Waste*, A. 1. And in former times prohibition was often issued to parsons, bishops, and other ecclesiastical persons, without any plea pending, *Stockman* v. *Weller*, 1 *Ro. Rep.* 86. *Knowle* v. *Harvey*, 1 *Ro. Rep.* 335. 2 *Bulst.* 79. 11 *Co.* 49 *b.* *Saccar*'s case, *Mo.* 917. *Com. Dig. Prohibition*, F. 15. In *Jefferson* v. *The Bishop of Durham* (*a*), all the authorities relating to prohibition to a bishop are collected and considered. So prohibition lies *to restrain a public nuisance*. In *Fitzherbert Nat. Brev.* 185. is a writ of prohibition to the mayor and bailiffs of a town to abate a nuisance *in vicis et venellis;* though it is said there, that that particular writ is to be confined to nuisances within towns corporate. So *Com. Dig. Action upon the Case for a Nuisance*, D. 4. An inhibition may be granted to remove a stage for rope-dancing, a bowling-alley, &c. where it becomes a nuisance. So for erecting a playhouse were it will be a nuisance. *Com. Dig. Prohibition*, A. 3. So a prohibition lies to restrain a public nuisance: and there are three cases extant in which this writ has been granted; the first is that cited by *Hale*, C. J. in 1 *Mod.* 76., who said that in the 8th year of *Car.* 1. *Noy* came into Court and prayed a writ to prohibit a bowling-alley, erected near *St. Dunstan*'s church; and had it. Another is *Jacob Hall*'s case (*b*), where it appears by the [600] note that the Judges upon view caused a record to be made of the nuisance, which was a rope-dancer's stage at *Charing Cross;* and issued a writ to the sheriff, on the record made, to abate the building. The third case is that of *The King* v. *Betterton* (*c*), where the only reason why the Court did not grant the prohibition was, that the grand jury for *Middlesex* was then sitting, before whom an indictment might instantly be found. Nuisances may be occasioned either by erecting or destroying: if a prohibition may issue to command the party to abate a nuisance, there is no reason why it may not issue to command the party to surcease from the work of demolition.

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(*a*) 1 *Bos. & Pull.* 105. (*b*) 1 *Mod.* 76. and 1 *Ventr.* 169.
(*c*) 5 *Mod.* 143. and *Skin.* 625.

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Lord ELLENBOROUGH, C. J. If there were in use a clear known festinum remedium, we might aid you; but when the application of a writ of prohibition to such a case as this would confessedly be new in modern practice, and there is a clear known remedy by indictment in the ordinary course, if the parties against whom you move be pulling down the old bridge illegally: we do not feel ourselves called upon to apply any new remedy. What must have been the case if the magistrates had ordered the bridge to be rebuilt on the old site; when it would have been impossible to continue the old bridge standing until the new one was finished? The public must have suffered a temporary inconvenience: and if the magistrates, from a desire to make the bridge a better one than before, have altered the situation of it; are they thereby to throw on the county the double burthen of [601] sustaining for a time two bridges instead of one; or are they to put on the county a greater expense by availing themselves of the statute than would have lain on them before? Here the inconvenience is only partial; and I do not know that it would be lessened by the mode proposed. But if any thing has been improperly done, there is a remedy for it by indictment; which, though slow, is the ordinary common law remedy for nuisances.

BAYLEY, J. If the justices had not changed the site of the bridge, would they not have had a right to use the materials of the old bridge in building the new one? Then can they be obliged to incur the additional expense of providing all new materials for the new bridge, because they have exercised the discretion given to them in changing it to a another site?

The other Judges concurring,

Rule refused.

Friday, May 8th.

RAPP *against* ALLNUTT.

By the statutes 35 *Geo.* 3. *c.* 63. *s.* 14. and 48 *Geo.* 3. *c.* 149. [602] if several distinct interests be insured in the same policy, though as for one entire sum, on goods "to be thereafter declared and valued;" and it appear in fact that the several interests included fractional parts of 100*l.*, which interests were afterwards declared and indorsed on the policy; such policy cannot be given in evidence, nor is available in law to any extent, unless stamped with a stamp of sufficient value to cover all such fractional parts; though it were sufficient to cover the entire sum insured.

THIS was an action brought upon a policy of insurance, made on the 14th of *September* 1810, for 500*l.* on goods to be thereafter declared and valued, on board the ship *Johannes*, at and from *London* to any port or ports in the *Baltic;* with various liberties reserved to the assured: and a loss was alleged, and proved to be

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by hostile seizure of the *Swedish* government in her port of discharge. The question upon the merits was disposed of by the verdict of the jury for the plaintiff, upon the trial before Lord *Ellenborough*, C. J. at *Guildhall*. But a new trial was moved for in the last term upon an objection arising upon the stamp acts; as to which the facts were these. The plaintiff was the agent and shipper employed for six different sets of owners, who divided between them in different proportions the whole interest of the cargo; the exact amount of the several interests was not known to the plaintiff on the 14th of *September*, when the insurance was effected, but it was estimated to amount altogether to 9500*l.*, and the policy was effected on a proper stamp to that amount, considered as one entire sum. On the 25th of *September* the different interests were calculated, including the premiums and expenses of insurance, indorsed upon the policy in the following proportions; 1660*l.*, 270*l.*, 1045*l.*, 808*l.*, 4495*l.*, and 1222*l.*, amounting numerically to the very sum insured; but on account of the different fractional parts of 100*l.*, requiring, as it was objected, a stamp of a higher rate than upon one entire sum of 9500*l.*, upon the same interest. The stat. 35 *Geo.* 3. *c.* 63. *s.* 1. imposes upon every policy of insurance of the description in question a stamp duty of 2*s.* 6*d.* for every hundred pounds progressively, and the like duty for every fractional part of 100*l.*; and *s.* 14. avoids every contract unless properly stamped. This was followed by the stat. 48 *Geo.* 3. *c.* 149. Schedule, article "Policy of Assurance," which provides, that "if the separate interests of two or more distinct persons shall be insured by one policy, then the duty, &c. shall be charged [603] thereon in respect of each and every fractional part of 100*l.*, as well as in respect of every full sum of 100*l.* which shall be thereby insured upon *any separate and distinct interest*."

The Attorney-General, *Park*, and *Gaselee*, shewed cause against the rule, and insisted that the only practical construction which could be put on the act was, that if upon the face of the policy there appeared to be different interests insured, the duty should be paid on every fractional part of 100*l.*, appertaining to every such separate interest; but could not be intended to apply to a case, where the same general agent who caused the policy to be effected had no knowledge of the extent of the several interests at the time, but made the policy upon the whole sum as interest should be declared. It is impossible at the time of subscribing the policy to know the exact amount of the several interests, including the policy stamp and premiums of insurance; for these last are liable to vary before all the subscriptions are completed;

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and by the 14th section of the stat. 35 *Geo.* 3. *c.* 63. the stamp must be upon the policy before it is subscribed. At all events, they contended that the stamp would be available as far as the sum covered by it.

Scarlett and *Puller*, in support of the rule, said that these regulations in the stamp acts were levelled against the frauds of brokers, who, having been employed by different persons to effect insurances with fractional sums, were used to procure insurance to be made for the several interests as for one entire sum, in order to
[604] secure to themselves the duties on the several fractional sums, with which they charged their principals, though not in fact paid to the revenue by this contrivance. If, therefore, the operation of the stat. 48 *Geo.* 3. *c.* 149. were confined to cases where the separation of interests appeared on the face of the policy, no check would be put upon such practices in future. As to the uncertainty of the several fractional sums at the time, if that were the fact, it is easy to make an allowance for it in the calculation of the stamp duty, as is always done in respect to the number of words in deeds.

Lord ELLENBOROUGH, C. J. I cannot properly say that I have struggled against this objection, because the desire of a Judge in all cases must be to decide according to law upon the facts in proof before him: but it is impossible not to feel for a party, the justice of whose case is to be defeated by a mere slip. In cases like the present there may be much difficulty in previously ascertaining the exact amount of each person's share, where the interests of several are insured by the same agent in one policy, because the amount of each depends not merely upon the invoice price of the goods, but also upon the premiums and expenses of the insurance, and these latter are uncertain till the last underwriter has subscribed. It comes, therefore, to this, either that the duty must be paid upon a sum large enough at all events to cover all possible fractional sums, and which may, therefore, turn out to be more than was necessary; or the several parties insured must run the risk of the policy being avoided, unless it can be supported upon the bonâ fide intention of such parties at the time. But their intention in such a case cannot guide the rule of law. It follows, therefore, that
[605] the duty must be calculated upon the actual amount of the several interests insured; and where from the nature of the case, it may be uncertain at the time into what fractional parts the whole sum may be divided in proportion to the several interests, due allowance must be made for a stamp large enough to cover all of them; otherwise the words of the act are peremptory, that the insurance shall be void, unless the paper, &c. on which the insurance is written,

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shall be stamped with a lawful stamp to denote the rate or duty directed, or some higher rate or duty in the act contained. The consequence in this case is that there must be a new trial; and if upon further consideration there should be found to be any doubt upon the matter, let the question be put upon the record by a bill of exceptions, which I shall be glad to sign.

GROSE, J. The words of the act are peremptory; though I agree that it may often be difficult to ascertain the exact amount of the several interests insured at the time: the party must at his peril take out a sufficient stamp. It is a hard case; but there can be no other rule of construction upon the words of the act.

LE BLANC, J. It is always hard when an objection made against the justice of the case is to prevail; but we must nevertheless, when called upon, put the true construction upon these revenue laws. The act of the 48 *Geo.* 3. requires the same duty to be paid for several interests insured by one policy, as if a distinct policy had been effected for each separate interest: and if a policy be effected on interest *to be* declared, the party effecting it must take care at his peril to provide an adequate stamp to cover all the several interests insured, and must make allowance for probable fractional sums. And if the stamp do not cover all the fractional sums, I cannot say that the policy can be admitted in evidence against the express words of the act of the 25 *Geo.* 3. *c.* 63. *s.* 14., which says, &c.

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BAYLEY, J. This policy, it is admitted, has not a stamp sufficient to cover all the fractional parts of 100*l.* appertaining to the several interests insured; and when the act of the 48 *Geo.* 3. has said that if separate interests be insured by one policy, the duty shall be charged thereon in respect of each fractional part of 100*l.* upon any separate and distinct interest; and when the act of the 35th *Geo.* 3. has said that no insurance shall be given in evidence or available in law, unless the paper, &c. on which it is written, shall have a lawful stamp to denote the rate or duty directed, or some higher rate of duty, &c.; how can it be said that the stamp shall be good as far as it goes? However, by sending the case to a new trial, the parties will have the power of putting the question upon the record, and taking the opinion of a court of error, if they think fit.

Rule absolute for a New Trial.

Friday, May 8th.

SMITH *against* PLOMER, Knt. and Another, Sheriff of MIDDLESEX.

A tradesman supplying a married woman living apart from her husband with furniture upon hire, does not thereby divest himself of the present right of property in such goods, inasmuch as the married woman was incapable of acquiring it by any contract; and therefore if the sheriff take such goods in execution at the suit of the husband's creditor, trover lies by the tradesman. But if the contract had been valid, the goods being let to hire generally, without any

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time limited, notice to determine the contract given to the sheriff's officer, and not to the other contracting party, would not be sufficient to determine the contract.

THIS was an action of trespass and conversion against the sheriff for taking and carrying away certain goods of the plaintiff, being different articles of household furniture. At the trial before Lord *Ellenborough*, C.J. at *Westminster*, it appeared that the plaintiff, a tradesman, had supplied the goods in question to one *Mary Ann East*, who, according to the entry in the plaintiff's books, was to pay him for the hire of them at the rate of 20*l. per cent. per annum* upon the value; but according to the evidence of Mrs. *East* herself, the goods had been recently put into her house by the plaintiff, for the hire of which she was to pay him; but at the time of the taking and conversion complained of, no contract had been made between them either for any precise time, or for any certain sum. Mrs. *East* was a married woman living at that time apart from her husband under a deed of separation; which was known to the plaintiff when he furnished her with the goods; and the sheriff entered and levied upon these goods by virtue of a writ of execution at the suit of a creditor of the husband. Before the sale by the sheriff, notice was given to him by the plaintiff, that the goods taken in execution were his property; and he claimed to have them restored to him. The plaintiff recovered a verdict for the value, with leave to the defendant to move to set it aside and enter a nonsuit, if the action were not maintainable: and in moving for the rule the case of *Gordon* v. *Harper* (*a*) was cited and relied upon, to shew that the action did not lie, inasmuch as the plaintiff had not the right of possession as well as the property of the goods in him at the time of the taking and supposed conversion, by reason that the right of possession was then in Mrs. *East* under the general contract of hiring.

Park and *Marryat*, shewed cause against the rule; and first distinguished this from the case cited; for there the goods were leased with the house; and during the lease, which was still subsisting at the time of the action brought, the landlord had no right to resume the possession of them: but here there was no contract subsisting either for time or money, and the property and right of possession was never out of the plaintiff. Mrs. *East* at most had only the use of the goods as long as the plaintiff pleased to let

(*a*) 7 *Term Rep.* 9.

them remain in the lodgings, and he had a right to resume them at his pleasure upon demand; and here the notice to and demand on the sheriff re-vested the right of possession in the plaintiff, even if he had parted with it before the bargain was concluded. But, secondly, they contended that Mrs. *East* being a married woman living apart from her husband, had no right to make a contract to bind him without his assent; and consequently his execution creditor could have no right to take the goods as his.

Garrow, and *Reader*, contrà. First, this was a contract for the hire of the goods *by the year*; as may be inferred from the entry in the plaintiff's books; and the only reason why the amount of the sum to be paid for the hire had not been ascertained, was because all the goods had not been sent in; but the rate of the hire was settled to be 20*l. per cent. per annum*, that is, upon the value of the goods; and before the calculation was made, the execution at the suit of the husband's creditor came in. But even taking it upon Mrs. *East*'s evidence, that no time was agreed upon, it would still be a contract as long as both parties pleased, determinable upon reasonable notice by either. But here there was no notice or demand from either of the contracting parties to the other; but only from the plaintiff to the sheriff, who was no party to the contract, and had no authority to give or accept such notice; and consequently the right of possession and a special property at least remained in the hirer of the goods. Secondly, it is not competent to the plaintiff to object to the capacity of the married woman to contract for the hire of the goods; for he knew her situation at the time of his contract. Besides, if these goods were such as were necessary for her, according to her condition, the contract would bind him; and if an action had been brought by her in her husband's name against the defendants who took them under the execution, the Court would have prevented him from giving a release, upon security being given to him against the costs of the action. [*Le Blanc*, J. There would be great difficulty in maintaining an action in the husband's name against a judgment creditor of his own who had taken his goods in execution. *Bayley*, J. The action in his name would have been trespass, and the plea would have been a judgment recovered against him, and execution thereon levied upon his goods. Then how could he have replied that the goods were not his?] That difficulty does not occur in this case. There is nothing to shew the disaffirmance of the contract by the husband.

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Lord ELLENBOROUGH, C.J. This case has been presented during parts of the argument in different points of view from what it

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appeared in at the trial. In order to maintain trover the plaintiff must have a present right of property in the goods: the first question therefore is, whether the plaintiff had put the right of property out of him by a valid contract for the hire of the goods with Mrs. *East?* If the contract were for a year, it would put the property out of him for that time: or if, according to Mrs. *East*'s evidence, the hiring were only general, without determining either price or time, it would operate as a contract for a reasonable price, so long as both parties pleased; and still the property would be out of him for the time if it were a valid contract. That brings it to the question whether Mrs. *East*, being a married woman, could make a valid contract for the hire of the plaintiffs's goods. Now a contract to be valid must bind both parties; but she being married, it could not bind her. It is said, however, that it would bind her husband, being for necessaries for her use: but I know of no case where a husband has been held liable upon a contract of this sort made by his wife living apart from him, as for necessaries; and no such case was made before the jury. Then has he confirmed the contract? There is no such evidence. The case therefore stands upon her own contract unconfirmed, which is liable to the infirmity of her being a married woman. It was argued on the other hand, that supposing the contract was good, the notice given by the plaintiff to the sheriff's officer would have determined it: but to that I cannot accede; for to determine a contract, which is determinable upon notice, the notice should be brought home to the other contracting party; and it is not enough that it should be given to one acting adversely under some supposed derivative title in the law from that party. The notice therefore which was given to the sheriff's officer would not alter the case. The conclusion is, that this action lies, because the plaintiff had the present right of property in him at the time, inasmuch as the married woman to whom he sent the goods was not capable of contracting with him for the hire, so as to take the property out of him.

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GROSE, J. I am of the same opinion. It is argued that the plaintiff had not a vested property in the goods in him at the time; but it is not shewn who had any property in them adverse to him. The property was clearly once in him, and nothing is shewn to devest it out of him.

LE BLANC. This is a mere question of law. The plaintiff cannot recover unless he can shew a present right of property. But it is clear, that originally the property was in him; and if he had parted with it, somebody else must have it. It is contended that

either Mrs. *East* or her husband took it. But she being a married woman could make no contract: and as to her husband, it is said that he was bound for necessaries for her; but these are not found to be necessaries. Then as to his adoption of the contract, it does not appear that he was even cognizant of it, and therefore had not adopted it. If then the property had not passed to another, it must have remained in the plaintiff. This distinguishes the present from the former case, where the property had passed from the original owner to another, and was out of the plaintiff who brought the action.

[BAYLEY, J. had left the Court before the conclusion of the argument.]

Rule discharged.

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KING *against* HARRISON, one, &c.

Friday, May 8th.

THE plaintiff declared against the defendant for a trespass, assault, and false imprisonment, and for detaining the plaintiff in custody for eight hours without any reasonable or probable cause, until he paid the defendant a large sum, to wit, 1267*l.* 12*s.* 4*d.* to obtain his discharge. To which the defendant pleaded that before the time when, &c. to wit, in *Hil.* 50 *Geo.* 3., by the judgment of the Court of *K. B.*, he recovered against the plaintiff 1682*l.* 10*s.* for damages and costs, and that 1267*l.* 12*s.* 4*d.*, part of the sum so recovered, being unpaid, the defendant before the said time when, &c. to wit, on the 28th of *November*, 51 *Geo.* 3., caused to be issued out of the said Court of *K. B.* upon the said judgment a writ of capias ad satisfaciendum, directed to the sheriff of *Middlesex* against the plaintiff, to satisfy the defendant 1267*l.* 12*s.* 4*d*; which writ was delivered to the sheriff; who before the return thereof, and before the said time when, &c. arrested the plaintiff by virtue of the said writ for the cause therein specified, and detained him for the time mentioned in the declaration, until he paid the said money, &c. The plaintiff replied, that the said writ of capias ad satisfaciendum was issued by the defendant out of the said Court *irregularly*, unduly, and improperly; the same having been issued for the said sum of 1267*l.* 12*s.* 4*d.*, as for the residue of the damages awarded to the defendant; whereas it ought only to have been for 300*l.* 12*s.* 4*d.*, as for the residue of the damages aforesaid, the other part thereof having been before then satisfied: and so the plaintiff averred that the defendant of his own wrong assaulted and

To a pela of justification in trespass, under a capias ad satisfaciendum issued at the suit of the now defendant against the now plaintiff, by virtue of which the latter was arrested and detained till payment of 1267*l.*; if the plaintiff reply that the writ was irregularly issued for so much, whereas *it ought only to*

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have been for 300*l.*, and that the Court afterwards on motion *ordered it to be quashed*, which fact was found for the plaintiff; the Court will intend, on the plaintiff's own shewing, that the writ was only *quashed for the excess;* and will therefore arrest the judgment.

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imprisoned him, &c. and not by virtue of the said writ for the cause therein specified, until he paid the said money for which the same was issued as aforesaid. And the plaintiff further averred, that the said Court on motion afterwards, to wit, on *Tuesday* next, after the morrow of the Purification, &c. in *Hilary* term, 51 *Geo.* 3. at *Westminster*, &c. by rule or order of the same Court then and there duly made, *ordered that the said writ so issued aforesaid should be quashed* (*a*); as by the said rule or order, reference being thereunto had, fully appears, &c. The defendant, protesting against the sufficiency in law of the replication, rejoined, that the said writ was issued regularly and properly out of the Court, and not irregularly, unduly, and improperly, for the sum above mentioned, and
[614] ought not to have been issued for a less sum, as in the replication alleged, and that the Court of *K.B.* did not on motion, by rule or order, order the said writ to be quashed in manner and form as in the replication alleged: on which issue was joined.

After a verdict for the plaintiff for 5*l.*, it was moved by *Park*, in the last term to arrest the judgment, on the ground that it appeared upon the whole record that the writ was only ordered to be quashed for the excess; and that this would not make the defendant a trespasser.

E. Lawes shewed cause against the rule, and contended that the only issue on the record, which was whether or not the Court had in fact *quashed* the writ of execution, having been found for the plaintiff in the affirmative, all that was necessary to maintain trespass stood admitted upon the record; and all that was introduced, as to the irregularity of the process in having been issued for a larger sum than was due, was irrelevant, and formed no part of the issue.

Park, and *Espinasse*, contrà, insisted that the Court would look at the whole record, from whence it would appear by the plaintiff's own shewing that the writ had been quashed for the excess only, and not for the whole sum recovered, part of which, but part only, had been before satisfied; and consequently the defendant, who acted under existing process at the time, could not be a trespasser by relation, but was only liable to an action on the case for an excessive levy. For which they referred to *Goslin* v. *Wilcock* (*b*)

(*a*) The rule which was of *Hilary* term 1811, was in this form. "*Harrison* v. *King*. It is ordered that the writ of capias ad satisfaciendum issued in this cause be quashed, and that the sum of 1267*l.* 12*s.* 4*d.* in the hands of the sheriff of *Middlesex*, by virtue of the said writ, be restored to the defendant, *after deducting therefrom* the sum of 317*l.* 12*s.* 4*d.* to be paid to the plaintiff with the costs of this application," &c.

(*b*) 2 *Wils.* 302.

Walterer v. *Freeman* (*a*), * *Belk* v. *Broadbent* (*b*), and *Page* v. *Wiple* (*c*). [*Le Blanc*, J. asked if there were any case where the party could justify under process which was afterwards vacated? But none was mentioned.]

Lord ELLENBOROUGH, C. J. The pleadings are some of the most faulty I have seen since I sat here; there is a double replication and a double rejoinder. The rule of Court too was informally drawn up: the writ of execution should only have been quashed for the excess. There might be some doubt, even if we were to consider the writ as having been quashed in toto, whether the party, who acted at the time under existing process, though irregular for its excess, could be exposed to be sued as a trespasser, because the Court afterwards quashed it (*d*). However, without deciding that point, but looking at the whole record, it appears to me that the Court only intended to quash the writ for the excess. The only difficulty in the case is, that it stands confessed in terms that the Court ordered it to be *quashed*. But the plaintiff himself does not complain that it ought not to have been issued at all, but only that it was irregularly, unduly, and improperly issued for so large a sum as 1267*l.* 12*s.* 4*d.*; admitting that it ought to have issued for 300*l.* 12*s.* 4*d.* Taking therefore the whole together, it stands admitted by the plaintiff himself, that the defendant had

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(*a*) *Hob.* 266. (*b*) 3 *Term Rep.* 183. (*c*) 3 *East*, 314.

(*d*) It seems agreed that process issuing irregularly from a court of competent jurisdiction to a proper officer will justify such officer acting under it at any time before it is vacated: but that such process, when vacated, is no justification to the party who procured it to be issued. See *Parsons* v. *Lloyd*, 2 *Blac.* 845., and the cases there cited, as also *Grant* v. *Bagge*, 3 *East*, 128. The principal question has been what should be the form of the action against the plaintiff in the original suit. In *Turner* v. *Felgate*, in 1658, (2 *Sid.* 125. *T. Ray.* 73,) it was held that trespass lay against the plaintiff in the former suit, who had taken the now plaintiff's goods in execution under a judgment which was afterwards vacated by rule of Court. But there is a note at the end of the report, that in *Easter*, 15 *Car.* 2. A. D. 1663, the Court were dissatisfied with this judgment, and said that such a relation shall not make any person a trespasser. The book refers to *Bailey* v. *Bunning*, reported in 1 *Sid.* 271, 2. as having been argued in *T.* 17 *Car.* 2., and decided in *Easter*, 18 *Car.* 2., where *Twisden*, J. said that relation to make a trespass had been strained, particularly in *Turner* v. *Felgate*; and this is stated more fully in 1 *Lev.* 95. However in *Philips* v. *Biron*, 1 *Stra.* 509. the distinction seems to have been admitted by the Court between an erroneous judgment, afterwards reversed by a Court of Error, and a judgment vacated for irregularity by the Court which gave it; considering that in the one case the fault was in the Court; in the other it was attributable to the party or his attorney. And the Court seem to have acted upon the same distinction in *Parsons* v. *Lloyd*.

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KING *against* HARRISON.

only issued it for a larger sum than he ought to have done. It appears therefore, by the understanding of both the parties, that the Court, by ordering the writ to be *quashed*, meant only only to quash it for the excess beyond the sum admitted by the plaintiff himself to be due.

GROSE, J. I do not know how to say that this defendant is a trespasser for having acted under the process of the Court.

LE BLANC, J. The difficulty is, that the writ is stated to have been quashed by the Court, when it was only quashed for the excess.

BAYLEY, J. had left the Court before this case was called on.

Rule absolute.

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Saturday, May 9th.

THOMAS *against* YOUNG & JOGGETT, Bail of GRAHAM (*a*).

Where the plaintiff had taken a cognovit from the defendant, with an agreement to receive the debt by long instalments; of which no notice was given to the bail; the Court set aside an execution against the bail sued out above a year after the judgment, without a scire facias to revive it: even if the agreement by the plaintiff to take the debt by instalments, without the consent of the bail, would not have discharged them; as they could not after that have rendered their principal.

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THIS came on upon a rule for setting aside the judgment in scire facias, upon the recognizance of bail, and execution issued thereon, for irregularity; which was obtained upon an affidavit of the defendant *Young* and *James Aubrey*. In *Trinity* term 1808, *Young* and *Joggett* became bail for *Graham* for 180*l.* at the suit of the plaintiff. *Young* swore, that not having heard any thing further respecting the action till *February* last, he was induced to believe it was settled; when on the 8th of *February* he received a letter from the plaintiff's attorney demanding payment of 70*l.* That he thereupon called on *Graham*, who was then in custody for debt, and assured *Young* that the action was settled; in consequence of which he took no notice of the demand. That in fact *Graham* had given a cognovit, of which the plaintiff's attorney never informed *Young*, but sued out execution against him marked to levy 69*l.* *James Aubrey* deposed, that the judgment in the original cause was signed on a cognovit as of *Hilary* term 1807. That on search at the office, no execution at the suit of the plaintiff against *Graham* had issued till *Hilary* term 1811, when a capias ad satisfaciendum was lodged against him, and returned non est inventus. That no scire facias had been issued to revive the judgment.

Burrough opposed the rule, on an affidavit that the action was brought against the principal in *Trinity* 1806 for 180*l.* That on

(*a*) I was not in Court when this case was decided, and am indebted for it to Mr. *Burrough*.

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THOMAS *against* YOUNG and Another.

the 21st of *February* 1807, he gave a cognovit for 206*l.* 13*s.* debt and costs. That it was provided that no proceedings should be had against the bail except on default of payment of 50*l.* on the 24th of *March* 1807; 50*l.* on 24th *February* 1808; and the like sum on the 24th of *February* in each subsequent year, till the whole was discharged. That *Graham* had paid all but the last instalment, which became due on the 24th of *February* 1810. That on the 23d of *January* 1811 a capias ad satisfaciendum was lodged, to be returned, and was returned non est inventus, within a year and day after the last instalment under the cognovit became due, and that the plaintiff proceeded against the bail by scire facias, and obtained judgment and took out execution. He cited *Michell* v. *Cue and wife* (*a*), where a rule for setting aside an execution, because it had been sued out above a year after the judgment obtained, without any scire facias to revive it, was discharged on the ground that the delay had arisen from the fact of the defendants themselves. So here the delay was occasioned by the conditions of the cognovit; and it has been held (*b*), that a cognovit given by the principal, without notice to the bail, does not discharge them.

Espinasse, for the bail, relied on the circumstance, that they had no notice of the terms of the cognovit; and were therefore lulled into security that the debt was paid, by the time which had elapsed without any demand made upon them. And

The Court (Lord *Ellenborough*, C. J. being absent) made the rule absolute, upon the ground that it did not appear that the bail had any notice that the cognovit had been given with an agreement to pay the debt by instalments. And *Bayley*, J. said that the plaintiff could not give a partial indulgence to the principal without the consent of the bail; and that, if he did, it discharged them; for the bail could not after this have rendered the principal.

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(*a*) 2 *Burr.* 660. (*b*) *Hodgson* v. *Nugent*, 5 *Term Rep.* 277.

NORTON *against* SHAKESPEARE.

Saturday, May 9th.

A deed of composition framed only for the *joint* creditors of two bankrupts, under which seven of the joint creditors, whose debts exceeded 2000*l.*, accepted of the proffered composition of 3*s.* in the pound, but which was not signed or accepted by three other joint creditors whose debts amounted to 92*l.*, nor by the separate creditors of one of the bankrupts, is not such a "*compounding with his or their creditors*," as will, within the stat. 5 *Geo.* 2. *c.* 30. *s.* 9., avoid the effect of a subsequent certificate under a commission of bankrupt, to protect the future estate and effects as well as person of one of the bankrupts, who was afterwards sued to judgment, and had execution levied on his goods by one of his separate creditors.

AN application having been made by the plaintiff to set aside a judgment and execution levied thereon at the suit of the defendant, this Court, upon cause being shewn against the appli-

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cation in last *Easter* term, directed the following issues: first, Whether the plaintiff had become a bankrupt and obtained his certificate; secondly, Whether the plaintiff had before his bankruptcy compounded with his creditors within the meaning of the stat. 5 *G.* 2. *c.* 30., and whether he was by his said certificate discharged as to his future estate and effects within the meaning of that statute. These issues were tried before Lord *Ellenborough*, C. J. at the *London* sittings after last *Trinity* term, when the jury upon the first issue, in respect of which no question afterwards arose, found a verdict that *Norton* was a bankrupt, and had obtained his certificate: and upon the last they found that he was not discharged by his certificate as to his future effects, as he had compounded with his creditors.

In *Michaelmas* term last *the Attorney-General* obtained a rule nisi for a new trial; insisting, on two grounds, that the composition which was proved at the trial to have been made by the plaintiff,
[620] and one *Wolfe Lyon* his partner, with their creditors, was not within the statute; first, because all the joint creditors of the plaintiff and *W. Lyon* had not compounded; secondly, because the separate creditors of the plaintiff were not included in that composition. In *Hilary* term *Garrow*, *Gurney*, and *Bowen* shewed cause against the rule; and *the Attorney-General*, *Topping* and *Beard*, were heard in support of it; and the cases of *Thornton* v. *Dallas* (*a*), and *Ex parte Green* (*b*), were cited: but as the material facts, as well as arguments relied upon in the discussion, are noticed in the judgment of the Court, it becomes unnecessary to give a further detail of either.

The Court took time to consider of their judgment, which on this day was delivered by

Lord ELLENBOROUGH, C. J. This case came before the Court upon a motion for a new trial; and the question was, whether *Norton* the plaintiff had made such a composition with his creditors as under the stat. 5 *Geo.* 2. *c.* 30. *s.* 9. limited the effect of a certificate he had obtained under a commission of bankrupt against him, so as to leave his future estate and effects liable to his creditors. The facts of the case were shortly these. The plaintiff and *Wolfe Lyon* were in partnership together, and their affairs being embarrassed, they called a meeting of their creditors, and offered a composition of 3*s.* in the pound, which several of their creditors agreed to accept. A release was accordingly prepared, by which the persons who signed it, being creditors of *Norton* and *Wolfe*
[621] *Lyon* jointly, in consideration of 3*s.* in the pound being paid to them severally and respectively at the time of sealing the release, in

(*a*) *Dougl.* 46. (*b*) 1 *Atk.* 257.

full satisfaction and discharge of their several and respective debts, released the plaintiff and *Wolfe Lyon* from all their claims and demands. This release was framed for the *joint* creditors only, not for any separate ones; beginning thus:—"We whose names are hereunto subscribed, &c. creditors of *Aaron Norton* and *Wolfe Lyon*." It was signed by seven of the joint creditors, whose debts exceeded 2000*l.*; but there were three joint creditors whose debts were 92*l.* who did not sign: and though the plaintiff had several separate creditors, particularly the defendant and *Hill Walton* and Co., the deed was not signed by them, nor was it so framed as to admit of their signatures. And the question is, whether this release constitutes such a composition as is within the st. 5 *Geo.* 2. *c.* 30. *s.* 9. By that clause, if any commission shall issue against any person or persons who, after the 24th of *June* 1732, shall have been discharged *by that act*, or *shall have compounded with his, her, or their creditors*, or delivered *to them* his, her, or their *estate or effects*, and been released by them, or been discharged by any act for the relief of insolvent debtors after the time aforesaid; the body and bodies only of such person and persons conforming to the act, &c. shall be free from arrest and imprisonment: but the future estate and effects shall remain liable. And we think the true construction of this clause is, that the compositions it contemplates are not such as are *limited*, and extend to a particular description of creditors only, but to such as are *general*, and would admit all creditors of whatever description they may be. A discharge under the stat. 5 *Geo.* 2. by bankruptcy and certificate, (in unexcepted cases,) is a general discharge: releasing the party from *all* debts, joint as well as several, and several as well as joint. A discharge under an insolvent act applies to *all* debts. And it seems to us that in the two other cases mentioned in this clause, of compounding with creditors, and delivering up the estate and effects for them, such a composition or delivery only is contemplated as is *general*, and calculated to admit *all* creditors of every description. As the composition therefore in this case was limited and confined to the joint creditors only, we are of opinion that it does not take away from the plaintiff the certificate he has since obtained; that the verdict therefore which was for the defendant was wrong, and that there ought to be a new trial.

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Saturday, May 9th.

KINNEAR *against* TARRANT and Another.

To scire facias against bail upon their recognizance, it is competent to the defendant to plead in bar against the issuing of execution, that before the issuing of the alias writ of scire facias the [623] plaintiff became bankrupt, and a commission issued against him, on which he was declared a bankrupt before the return of the writ, and his effects, debts, &c. assigned to the provisional assignee, who before plea pleaded assigned to the assignee under the commission, who was entitled to sue the defendants, &c.

THE plaintiff declared in scire facias against the defendants upon their recognizance, taken in *Easter* term 49 *Geo.* 3., as bail for *R. Simpson,* in 1345*l.* 12*s.* against whom judgment was alleged to have been recovered by the plaintiff in *M.* 50 *Geo.* 3. for 1259*l.* 10*s.* damages and costs; and stated the 1st scire facias tested the 9th of *May,* and returnable in five weeks of *Easter,* 50 *G.* 3. (27th of *May,*) and the alias scire facias (which would be tested on the quarto die post or 30th *May*) returnable on the morrow of the Holy Trinity in the same year; to both of which *nihil* was returned: and after the appearance of the defendants, the plaintiff prayed execution against them according to the form and effect of their said recognizance.

The defendants pleaded, that before the issuing of the alias writ of scire facias, viz. on the 28th of *May* 1810, the plaintiff, being a merchant, dealer and chapman, and seeking his trade of living by buying and selling, and being indebted to *R. Hamilton* in 100*l.* and upwards, and also to divers others in sundry sums, became and was a bankrupt, within the intent and meaning of the statutes, &c.: and that thereupon afterwards, and before the issuing of the alias writ of scire facias, a commission of bankrupt was, upon the petition of the said *R. H.,* duly awarded and issued against the plaintiff, by virtue of which the plaintiff was afterwards, and before the said alias writ was returnable, to wit, on the 31st of *May* 1810, duly adjudged and declared to be a bankrupt: and that afterwards, and before the said alias writ was returnable, to wit, on the same day and year last aforesaid, by an indenture then and there made by three of the commissioners, &c. (but which indenture is not nor ever has been in the custody or power of the defendants,) all the goods and chattels, debts, &c. and other personal estate and effects of the plaintiff which he was entitled to at the time he so became bankrupt, were duly assigned to *J. C.,* the provisional assignee thereof, for the benefit of the plaintiff's creditors, &c. whereby the said *J. C.* then and there became and was, and from thence until and at the time of making the after-mentioned indenture, continued to be entitled to sue upon the cause of action for which the plaintiff has declared on the said writs of scire facias as aforesaid. And that after the return of the alias writ of scire facias, and since the plaintiff so declared, but before the filing of

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this plea, to wit, on the 4th of *July* 1810, by another indenture of * that date made by *J. C.*, the provisional assignee, and three of the commissioners, &c. (but which indenture is not nor ever has been in the custody of the defendants,) *J. C.* the provisional assignee, by the consent and direction of the said commissioners, assigned over, and the same commissioners ratified and confirmed the goods, chattels, debts, &c. and all other the personal estate and effects of the plaintiffs, which he was entitled to at the time he so became bankrupt, to *R. Rushforth*, &c. (the assignees chosen under the commission, in trust for the benefit of the plaintiff's creditors: whereby the said *R. Rushforth*, &c. then and there became and were, and from thenceforth hitherto have been and still are entitled to sue for and upon the cause of action aforesaid, &c. and this the defendants are ready to verify: wherefore, they pray judgment if the plaintiff ought to have execution against them by pretence of the said recognizance. There was another similar plea, only stating that after the plaintiff had been duly adjudged and declared a bankrupt, and before he had declared on the writs of scire facias, all his estate and effects at the time he so became bankrupt were duly assigned to *J. C.*, who thereby became and was the assignee thereof, and remained and continued such assignee from thence until and at and after the return of the writ of alias scire facias, and also until and at and after the time when the plaintiff so declared as aforesaid.

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Replication.

The plaintiff replied, that always after the time that he became a bankrupt, as in the first plea mentioned, and after the making of the said indenture of assignment to *J. C.*, until the making of the said other indenture of assignment in that plea mentioned, the proceedings upon the said writs of scire facias were continued by the said *J. C.*, as such assignee as aforesaid, in the name of the plaintiff, for the use and benefit and on the account of the plaintiff's creditors who should take the benefit of the said commission, and that the plaintiff declared on the said writs for their use and benefit and on their account accordingly, and not for his own use or benefit: and that always since the making of the indenture of assignment in the said plea secondly mentioned, the proceedings on the said writs of scire facias have been and still are continued by the said *R. Rushforth*, &c. as such assignees, in the name of the plaintiff, for the use and benefit and on the account of such creditors as aforesaid, and not for the use or benefit or on the account of the plaintiff: and this he is ready to verify: wherefore, &c. There was a similar replication to the second plea, omitting the

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latter part relating to the general assignment. To these replications there were general demurrers.

Marryat, in support of the demurrers, stated the question to be whether an action can be supported, though for the alleged benefit of the creditors, in the name of a bankrupt, whose property and credits have been assigned to another under his commission before declaration, against a defendant who pleads the bankruptcy, merely because the process had issued, though it was not served, before the date of the assignment or commission. There is no case where a defendant has had a day to plead given him, and the means of pleading the defendant's bankruptcy in bar, in which the Court have refused to give effect to such his legal defence; though upon summary applications, where the defendant has come to ask a favour of the Court, they may have imposed terms on him which
[626] precluded him from resorting to it, and permitted the assignees to go on with the action in the bankrupt's name, on their giving security for the costs. Bankruptcy is a good plea even after the last continuance; then why not where the bar arises even before declaration? In many cases it may be of importance to a defendant to be sued in the name of the assignees rather than of the bankrupt, because he may want to examine the bankrupt as a witness. Besides, the stat. 1 *Jac.* 1. *c.* 15. *s.* 13. having taken the right of action out of the bankrupt and vested it in his assignees, precludes his proceeding to recover the debt. [Lord *Ellenborough*, C. J. There is no doubt that the debt and the right of action for it are vested in the assignees, as between them and the bankrupt: the only question would be, whether the assignees may not renounce a benefit given to them by the law.] The act goes on to say that after the assignment the bankrupt shall not have power to recover the same: a recovery therefore by him would be no bar to an action for the same debt by the assignees, who are no parties to this record. Where indeed a bankrupt has before his bankruptcy assigned the beneficial interest in a chose in action to another, if the debtor, when sued in the name of the bankrupt, plead the bankruptcy, the plaintiff may reply the previous beneficial assignment; but that is because the mere legal interest which the bankrupt had as trustee for another does not vest in his assignees.

Littledale, contrà, contended that the bankruptcy of the plaintiff, after the action commenced, was no abatement of the suit. But, if it were, that at any rate it was not pleadable in bar, as this was pleaded, but in abatement. With respect to the form of the plea,
[627] he argued that it should have concluded with praying that the writ ought to be quashed, and not that execution should not issue; for

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if it were quashed, there are no costs on either side. If a suit be once legally commenced, as here it was by the scire facias, any thing which happens afterwards to interrupt its progress should be pleaded in abatement. Therefore in *Bret* v. *Papillon* (*a*) the Court held that a plea of alien enemy, (where the plaintiff had become such after the commencement of the action,) ought not to conclude with praying that the plaintiff should be barred from *having* or maintaining his action, but from *further having* or maintaining his action: and it was there laid down generally, that where matter of defence arises after the action, it is pleadable in abatement and not in bar. Upon the principal ground, that the bankruptcy of the plaintiff was no abatement of a suit once well commenced, he referred generally to *Austen* v. *Waugh* (*b*), *Bibbins* v. *Mantel* (*c*) and *Hewit and others, Assignees of Bibbins,* v. *Mantel* (*d*) where that position is laid down in general terms. To shew that it was no abatement of a suit in equity, he referred to *Cooke's Bankrupt Laws,* which collects the several cases on the subject. It is also considered to be no abatement at law, where the suit is carried on by the consent of the assignees. In *Webb* v. *Fox* (*e*), this Court permitted an uncertificated bankrupt to maintain trover for goods acquired after his bankruptcy; which was pleaded; as the assignees made no objection; and in point of law there is no difference between goods acquired before or after the bankruptcy, with respect to the [628] right of property in the assignees; as in *Kitchen* v. *Bartsch* (*f*), where the assignees having interposed and required the defendant to pay them the money claimed by the bankrupt, it was held that he could not recover upon a promissory note. So in *Kretchman* v. *Beyer, in error* (*g*), *Buller,* J. said, "the rule is that the assignees cannot make themselves party to the record in any intermediate stage of proceeding, but only immediately after judgment; though an interlocutory judgment is sufficient for that purpose. Here the assignees should have gone on with the writ of error in the bankrupt's name till judgment; therefore the scire facias (which had been sued out by the assignees in their own names after judgment and a writ of error allowed to compel an assignment of errors,) must be quashed." [*Bayley,* J. There the assignees had no power to make themselves parties to the writ of error. Suppose this had been an action of assumpsit, and that the statute of limitations would have run upon the demand by the time this plea was put in; how could the assignees have brought a new action after the six years? [*Le Blanc,* J.

(*a*) 4 *East,* 502. (*b*) 3 *Term Rep.* 437. (*c*) 2 *Wils.* 358.
(*d*) 2 *Wils.* 372. (*e*) 7 *Term Rep.* 391. (*f*) 7 *East,* 53.
(*g*) 1 *Term Rep.* 463.

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They might have continued the action by the writ of journeys accounts (*a*). [Lord *Ellenborough*, C. J. asked if any case were known to have occurred where, after a plea, of the plaintiff's bankruptcy, the assignees had attempted the experiment of making themselves parties to the record to carry on the suit? and mentioned that in *Fowler* v. *Down* (*b*), *Eyre*, C.J. in *C. B.* seemed to consider that the bankruptcy did not extinguish the right of action, but that
[629] it was transferred to the assignees merely by the assignment.] So the cases cited shew, that if the assignees do not interfere, the action may proceed in the bankrupt's name.

Marryatt in reply. The whole argument on the general point rests upon the authority of *Bibbins* v. *Mantel* (*c*); for *Hewit* v. *Mantel* (*d*) was founded on that; but there the plaintiff had obtained interlocutory judgment before his bankruptcy, and the action was held properly to proceed in his name during the execution of the writ of inquiry and till final judgment, on the ground that the defendant had no day in Court, being after the award of the writ of inquiry, nor could afterwards plead any thing to the action. But after final judgment, the assignees brought scire facias on it, and recovered the debt against *Mantel*. *Waugh* v. *Austen* (*e*) came on upon motion made on the part of the defendant; and all the other cases proceeded upon the authority of *Bibbins* v. *Mantel*. *Webb* v. *Fox* (*f*) which comes nearest to this, was an action against a wrongdoer; and the cause of action had never been vested by assignment in the assignees; though they might have reduced their right into possession by seizure. If the bankrupt might go on with the suit; why might not the defendant pay him at once, without defending the action? But that is not even contended for. Neither if the defendant had let judgment go by default, could he have pleaded a recovery in bar to an action by the assignees. By the same mode of reasoning, a suit might be continued by the executors of a dead man in his name. As to the form of the plea; nothing is pleadable
[630] in abatement, unless the defendant can give the plaintiff a better writ; but the matter of this plea shews that the plaintiff had no right of action at all, and was therefore properly pleaded in bar (*g*).

Cur. adv. vult.

Lord ELLENBOROUGH, C. J. now delivered the judgment of the Court. (After stating the pleadings.) No case has been cited where the defendant, having a day in Court to plead it, has been prevented from pleading the bankruptcy of the plaintiff and

(*a*) See *Terms de Ley*, and *Spencer's case*, 6 *Rep.* 10. (*b*) 1 *Bos. & Pull.* 47.
(*c*) 2 *Wils.* 358. (*d*) *Ib.* 372. (*e*) 3 *Term Rep.* 437.
(*f*) 7 *Term Rep.* 391. (*g*) Vide *Harris* v. *James*, 9 *East*, 82.

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the assignment of his effects, in bar to his recovery, or his having execution. All the cases referred to are cases where a summary application has been made to the Court for its interposition; and there is no case where the question has arisen on the record by plea pleaded. But in *Hewit and Others, Assignees of Bibbins*, v. *Mantel*, 2 *Wilson*, 375., where, after interlocutory judgment obtained, the plaintiff had become bankrupt, and had afterwards proceeded to final judgment; on which judgment the assignees had brought scire facias to have execution; and the defendant pleaded the whole matter in bar, and prayed judgment if the assignees ought to have execution against him for the damages; to which plea the assignees demurred; and the Court gave judgment for the assignees and against the plea; in giving judgment, Lord Chief Justice *Wilmot* says: "indeed if the bankrupts themselves had brought a scire facias, this plea might have been good; because after they became bankrupts, *perhaps* they could have no legal right to have execution." And Lord *Mansfield* expresses his opinion more decidedly in a case which came before [631] this Court in *Michaelmas* term 1782, and which is not in print. That was, *Barnes, Assignee of Saunders, a Bankrupt*, v. *Maton*. "Mr. *Mansfield* shewed cause against a rule for discharging a defendant on common bail, in an action brought by the assignees of a bankrupt, on the ground that he had been before arrested by the bankrupt before his bankruptcy for the same cause of action, and had been since arrested afresh by the assignees in the present action. The suit brought by the bankrupt before his bankruptcy had proceeded no further than the delivery of a declaration. And he cited 2 *Wilson*, 358, *Bibbins and Others* v. *Mantel*. Mr. *Bearcroft*, contrà, in support of the rule, cited *Mayhoe* v. *Gregory*, *Trin.* 1777, as exactly in point. He said, It is enough for me to shew that the assignees may proceed in the first action if they please: for if the first may go on, the second is vexatious, and the defendant ought to be discharged. The case in *Wilson* was after a judgment obtained by the bankrupt. What hinders the assignees going on with the action in the name of the bankrupt? Why the defendant may plead the bankruptcy: but the Court will not allow such plea if the assignees come in and say, pay the money to us and not to the bankrupt. Lord *Mansfield*. The right ground is that the second action is not vexatious if the assignees could not proceed in the first action brought by the bankrupt. The defendant might have pleaded the bankruptcy, and the Court could not have set aside a legal bar." And as the same plea has been pleaded in the present case, which the Court of *K.*

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B. in the case of *Barnes, Assignee*, v. *Maton*, just cited, recognized as a legal bar, we cannot deny the same effect to these pleas in the present instance; and must therefore pronounce *that the plaintiff, the bankrupt, cannot, under the circumstances stated in these pleas, have execution against the bail upon their recognizance.

Saturday, May 9th.

The KING *against* The Justices of LONDON.

An appeal against a poor's rate in *London* or *Middlesex* must be made, as in all other counties, to the next (*i.e.* next practicable general *quarter* sessions; though the stat. 17 *G.* 2. *c.* 38. *s.* 4. in its terms gives the appeal to the next *general* OR *quarter* sessions; it appearing from other parts of the act, as well as from other acts in pari materiâ, that those terms are used synonymously; and though in the two counties named there are four *general* as well as four *general quarter* sessions.

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IN this case, which was argued in last *Hilary* term by *Nolan*, *Gurney*, and *Bolland*, in support of the rule for a mandamus; and by *Park* and *Adolphus*, against it;

Lord ELLENBOROUGH, C. J. now delivered the judgment of the Court.

This was a motion for a mandamus to enter continuances upon an appeal by *John Stocks*, against a poor's rate: and the question was whether in *London*, where there are eight sessions every year, four *general quarter* sessions, and four *general* sessions, a party is bound to appeal to the *general* sessions, if they occur first after the rate; or whether he is entitled to pass over the *general* sessions, and appeal to the next *general quarter* sessions. The rate in this case was published in the church on the 28th of *October* 1810: the next general *quarter* sessions were on the 29th of the same month; but as there was no interval between them and the publication, it could not be expected that the appeal should be made at those sessions. The next general *quarter* sessions were in *January* 1811; and to that sessions Mr. *Stocks* appealed; but as a *general* session had intervened, the question is whether the appeal was not out of time. The appeal was adjourned to the three following *quarter* sessions; and at an adjournment of the *October* quarter sessions in *November* 1811, the sessions decided that Mr. *Stocks* had not appealed in time; and on that ground dismissed the appeal. By the stat. 43 *Eliz. c.* 2. *s.* 4., if any person shall find himself aggrieved, the justices of peace, at their *general quarter* sessions, shall take such order therein as to them shall be thought convenient. This statute therefore gave the appeal to the *quarter* sessions indefinitely, without even limiting it to the *next* which should occur. By stat. 17 *G.* 2. *c.* 38. *s.* 4., a person aggrieved may appeal to the next *general* OR *quarter* sessions of the peace for the county, riding, division, corporation or franchise, where the

township, parish, or place, for which the rate is made, lies: but if it shall appear that reasonable notice was not given of the appeal, the justices shall adjourn it to the next *quarter* sessions, and then finally hear and determine it. And the said justices may award to the party, for whom the appeal shall be determined, reasonable costs, in the same manner as they are empowered to do in the case of appeals concerning the settlement of poor persons by stat. 8 & 9 *W.* 3. *c.* 30. This statute therefore limits the appeal (in terms) to the next *general* or *quarter* sessions, and the question is whether the word "*general*" is used with a view to those places which have both *general* and *quarter* sessions, as *London* and *Middlesex;* or whether it is not used as another word for *quarter* sessions, in contradistinction to a *special* sessions; every *quarter* sessions being a *general* sessions? And we are of opinion that the latter is the true construction; and that an appeal to the next *quarter* sessions, notwithstanding the intervention of a *general* sessions, is in time. The direction to adjourn to the next *quarter* sessions, if proper notice be not given, dropping the word *general*, falls in with the notion that the legislature used it in the sense we adopt; for if these appeals were to be heard at the general sessions which intervened between the quarters, no reason [634] can be given why the adjournment should not have been to the next *general* as well as to the next *quarter* sessions. The direction too as to costs raises an inference that this is the right construction: for no costs can be given under the stat. 8 & 9 *W.* 3. but at the *quarter* sessions; inasmuch as the appeal against an order of removal is, under the stat. 13 & 14 *Car.* 2. *c.* 11. *s.* 2., confined to the *quarter* sessions. The next section too in the stat. 17 *G.* 2. *c.* 38. viz. *s.* 5., speaks of the general or quarter sessions for a *county, riding, or division:* whereas there is no *county* but *Middlesex*, in which there are in fact *general* sessions in addition to the *quarter* sessions; and they do not occur in any *riding* or *division.* We therefore think that the appeal was in time, and that the rule should be made absolute.

Saturday, May 9th.

THORNTON *against* FORD and SERLE, Clerks, and HOLLIDAY.

Claim of conusance by the university of *Oxford* was allowed in an action of trespass against a proctor, a pro-proctor, and the marshal of the university; though the affidavit of the latter, describing him as of a parish in the suburbs of *Oxford*, only verified that he then was and had been for the last fourteen years a common *servant* of the university called marshal of the university, and that he was sued for an act done by him in discharge of his duty and in obedience to the orders of the other two defendants, without stating that he resided within the university, or was matriculated.

THE plaintiff having sued out and served the defendants with a writ of latitat, tested the 23d of *January* last, and returning on the 8th of *February*, to answer her in this Court in a plea of trespass; to which the defendants appeared; a claim of conusance of such plea was thereupon made and entered on the record, as of the return-day of the writ, by Lord *Grenville*, as chancellor of the university of *Oxford*, in the form set forth in the case of *Williams* v. *Brickenden*, 11 *East*, 543, and *Welles* v. *Traherne*, *Willes*, 234, there referred to, mutatis mutandis; by which it appears that the university, under letters patent of *Hen.* 8. and the statute of confirmation of 13 *Eliz. c.* 29, claimed conusance inter alia of all manner of trespasses, &c. pleas, and complaints personal, &c. arising, done, or committed within the town of *Oxford*, the suburbs, &c. as well at the suit of the king, as at the suit of the party, or otherwise howsoever, *where the scholars, or their servants or ministers*, or any other persons *who ought to have any privilege of the said university*, whom the said chancellor, &c. should challenge, was or should be one of the parties, &c. The claim of conusance afterwards proceeded to state that the defendants on the day of the issuing of the said writ or process, and at the time when the cause of action of the plaintiff accrued, and before that time and continually since hitherto were and are persons who ought to have the privilege of the said university in this behalf actually resident and abiding therein; that is to say, the said *James Ford* was and is a master of arts and a fellow of *Trinity* college in the said university, and one of the proctors of the said university, dwelling and residing in the same, and therein matriculated: and the said *P. Serle* was and is a master of arts, and a fellow of *Trinity* college in the said university, and one of the pro-proctors of the said university, dwelling and residing within the said university, and therein matriculated: *and the said* J. Holliday *was and is a servant or minister of the chancellor, masters, and scholars of the said university, to wit, the marshal of the said university, within the jurisdiction thereof;* and that the plaintiff's cause of action arose and accrued within the liberties of the said university, that is to say at *Oxford* aforesaid; and that the said defendants were and are subject and ought to be sum-

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moned and impleaded for the said cause and matters in the said writ or process mentioned before the chancellor of the university aforesaid, &c. and not elsewhere, or in any other court whatsoever, &c.

The defendant Mr. *Ford* stated in his affidavit the service of the process and notice of declaration upon him at the suit of the plaintiff on the 8th of *February* 1812, and that from the 24th of *April* 1811 he has been a constant resident member of the university, and for the whole of that period, and for several years before, one of the fellows of *Trinity* college in the university; and that before and at the time of committing the supposed trespass, and of the service of the said writ and notice, he was and still is a resident master of arts, and one of the proctors of the said university actually resident and abiding in the said university, and one of the fellows of *Trinity* college aforesaid; and that the supposed trespass for which he is sued was for an act done by him on the 29th of *November* last in discharge of his duty as one of the proctors of the university. That the courts of the chancellor of the university are regularly holden from time to time during term, for the trial of all suits within the cognizance and jurisdiction of the said court, and that the defendant is liable and willing to be called upon to answer the plaintiff in the said court. There was a similar affidavit by Mr. *Serle*, master of arts, fellow of *Trinity* college, and one of the pro-proctors of the university, as to his residence in the university before and at the time of and ever since the supposed trespass committed by him; and also that this action was commenced against him for an act done on the 29th of *November* last in discharge of his [637] duty as one of the pro-proctors; and that he was also liable and willing to answer the plaintiff in the university court. The affidavit of the other defendant *Holliday* described himself to be *of the parish of* St. Mary Magdalen, *in the suburbs of the city of* Oxford, *and marshall of the university of* Oxford: and stated that he now is and had been for the last 14 years, and was at the time of the supposed trespass and of the service of the writ and notice, *a common servant of the university, and called marshal of the said university;* and that the supposed trespass for which the action is brought was an act done by him on the 29th of *November* last in the discharge of his duty in obedience to the orders of the two other defendants Mr. *Ford* and Mr. *Serle*. This affidavit concluded like the others. There was a further affidavit verifying the matriculations of Mr. *Ford* and Mr. *Serle*, as registered in the book of matriculations. But neither in the affidavits, nor in the letters mis-

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sive of the chancellor, from which sources the formal entry on the record of the claim of conusance is drawn up, was there any express mention made of the matriculation, or residence within the university, of the other defendant *Holliday*: and upon this ground,

Carr and *Richardson* now objected to the claim of conusance made: and referred to *Hayes* v. *Long* (*a*), to shew that the residence of the party within the university, on whose behalf the conusance was claimed, was necessary to be shewn, and could not be intended. And they referred to certain of the statutes of the university, which they read, requiring all the servants as well as students of the university to be matriculated. [It was objected by the counsel for the defendants, that these statutes were not brought before the Court by affidavit, and therefore could not be noticed: but *the Court* said that the plaintiff should not be prejudiced by that, if anything important turned upon them.] They then read Stat. titulus 18. "de Ministris et Servientibus Universitatis." Sect. 1. de Registrario Universitatis. Then tit. 2. de Matriculâ Universitatis, sect. 2. "Matriculæ distributio in capita.—Volumus ut hoc registrum sive liber matriculationis in tot capita quot sunt collegia et aulæ dividatur; quibus etiam adjungatur aliud caput, continens omnes et singulas alias personas privilegiatas intra præcinctum universitatis habitantes et commorantes." Sec. 6. "Statutum est quod quilibet laicus, ad privilegia universitatis admittendus, curet se in matriculam universitatis referendum; et tempore admissionis suæ idem juramentum præstat quod studentes et scholares; et insuper juret quod nunquam aliquam causam suam coram majore aut Ballivis attemptabit, nec coram eorum aliquo, tanquam suo judice, respondebit, quamdiu in universitatis obsequio permanserit." The charter of *Hen.* 8. mentions generally, *students and ministers;* and the statutes of the university direct certain registers to be kept, in order to ascertain what persons come within those general descriptions: and those for whom the privilege is claimed ought to shew that they are within the registered description. Now though two of the defendants appear to have been matriculated, yet the third does not; and this is a joint trespass by the three, and the privilege claimed must extend to all or none; as in the case of an attorney who has no privilege when acting with others. [Lord *Ellenborough* C. J. observed that that might be so, if this were a personal claim of privilege set up by the individuals; but the claim of conusance was here made by the university whose privilege it was.]

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The Attorney-General, Abbott, and *W. E. Taunton,* in support of

(*a*) 2 *Wils.* 311. and *ib.* 409.

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the claim of conusance, were stopped by the Court, after the first had shortly pointed out the distinction between the former cases, where the claim had been made on the part of masters of arts and other members of the university not necessarily resident in it; and this case, where the claim was made on behalf of the proctors, and an acting servant of the university, who exercised personal offices and duties within the university, which necessarily obliged them to residence, and where the very act of their interference shewed that they were all in fact present within the university at the time.

Lord ELLENBOROUGH, C. J. The only question is, whether a person who swears that he now is, and has been for the last 14 years a common servant of the university, called the marshall, and was so at the time of the supposed trespass, &c. when he was acting in discharge of his duty, and in obedience to the other defendants, must not be taken to be within the privilege of the university at the time, where there is no evidence to the contrary; and where the charter gives the cognizance to the university court in respect of all actions of trespass &c. "where the scholars, or their *servants or ministers*," &c. shall be one of the parties. Is he a servant? He is expressly stated to be such: his duties are altogether of a local nature within the university; and by the common law [640] presumption, if he have personal duties to perform which require his constant residence, he must be taken to have been resident in the regular performance of his duties, if nothing appear to the contrary. But it is objected that he is not expressly stated to have been resident. If the charter had in express terms required such a person to be resident within the university, then indeed he must have been stated to be so at the time; but that is not in terms required. With respect to students, masters of arts, and others, who may or may not be resident members, the Court has thought it a reasonable interpretation of the general words of the charter, that their actual residence should be verified, in order to bring them within the privilege of being sued only in the university court: but the servants of the university must necessarily be resident there: their duties are of a local nature, and in almost daily exercise: of all persons they must have the most fixed domicile there; and I observe that he is described to be of a parish in the suburbs of the city of *Oxford*. Supposing, however, that he never slept within the university, but was daily in waiting within it to do his duties when called upon; still I cannot say that he would not be privileged. Then it is objected that he is not in the book of matriculation; which may be owing to the neglect of some other person;

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or he himself may incur an academical offence for not having procured himself to be matriculated; and it may be a convenient regulation that every servant, as well as member of the university, should be registered: but the privilege now claimed is not personal to the man, but is the privilege of the university, and his negligence cannot exclude them from insisting upon their claim of conusance for their servants. If, therefore, it were to be admitted that
[641] the claim of conusance must be perfect in all its parts for all the three persons, this is perfectly made out.

GROSE, J. agreed.

LE BLANC, J. The charter not having in terms made residence a qualification, the Courts, looking to the reason of the privilege, have put that construction upon it; and in certain cases, where it has been claimed for part of the description of persons named, who are not necessarily resident, they have required their residence to be verified. But there is no necessity for applying the same rule to another description of privileged persons, like the defendant *Holliday*, who being a common servant of the university, for the execution of local duties, must necessarily reside there in order to perform those duties.

BAYLEY, J. agreed.

Conusance allowed.

Saturday, May 9th.

BLUNDELL, Clerk, and ATHERTON, *against* MAUDSLEY.

In debt upon the stat. 2 & 3 *Ed.* 6. c. 13. for not setting out *a tenth* as the tithe of hay, the
[642] plaintiff is entitled to recover upon his common law right, unless there be evidence of some certain good modus or customary payment in lieu of the common law tithe; and though the plaintiff gave in evidence a terrier of 1696, stating a custom to take the 11th cock of hay in a certain advanced state of preparation; and though his own and the defendant's witnesses stated other varying modes of payment; yet the terrier not being conclusive, and the jury not finding the 11th cock of hay renderable, or other specific customary mode of tithing, the plaintiff is entitled to recover.

THIS was an action of debt on the stat. 2 & 3 *Ed.* 6. *c.* 13. for not setting out a tenth, as the tithe of hay, in the parish of *Halsall* in *Lancashire*, of which parish Mr. *Blundell* was rector, and *Atherton* his lessee of a moiety of the tithe in the townships of *Melling* and *Maghull*, in that parish, which consisted of six townships. At the trial before *Wood*, B. at *Lancaster*, the plaintiff called a witness, who, after proving the defendant to be in the occupation of a farm in the parish, and that he had refused to set out the tithe of hay-grass, and hay-clover, spoke generally of a custom in the parish to take the 11th cock, but had never known any instance of its having been taken in kind within the townships in question. The

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plaintiff afterwards put in a terrier from the registry, dated *July* 14, 1696, and signed by the rector, curate, and two churchwardens, which mentioned several customs; amongst which was stated—"our custom for tithe of corn is to tithe at the 11th hillock, on condition it be set up, and at the 11th cock of hay when it is dried and withered. Hemp and flax is gathered in kind, or in lieu thereof 18*d.* a measure." On this evidence the defendant's counsel objected that this action could not be maintained, for not setting out the *tenth*, as tithe, when the plaintiff's evidence proved that the 11th only, and not the 10th, was payable. To which it was answered by the plaintiff's counsel, that this was in the nature of a modus, of which, if the defendant meant to avail himself by way of defence, he must shew that he had set out his tithe according to the custom; and that in a similar case two learned Judges had been of that opinion. The learned Judge, however, who tried the cause, was of opinion that the non-payment of a customary tithe was either not within the penalty of the act of *Ed.* 6.; or if it were, that the plaintiff should have declared that by custom the 11th was payable, which the defendant had not divided and set forth; as the statute speaks of tithes, which of right or *custom* ought to have been paid. But he permitted the cause to proceed; reserving the point for the consideration of this Court. The defendant's counsel then called witnesses for the purpose of proving that the tithes of hay and clover were covered by moduses in the townships of *Melling* and *Maghull*. But none of the witnesses had ever recollected the payment of tithe hay in kind; and the money payments for different kinds of land on which hay was made had varied for different estates; in some 1*s.*, in others 1*s.* 3*d.*, in others 1*s.* 6*d.* an acre; two of the variations, at least, affecting clover as well as natural grass. The learned Judge, on summing up this evidence, stated to the jury the nature of an immemorial modus, and that to constitute its validity it must have existed from the beginning of the reign of *Rich.* 1., and that if from the sums, the moduses, or any other circumstances, they were satisfied that the sums had not been paid for that period, they must find against the moduses. Then, after pointing out to them the variations in the evidence, as to the payments made, he left it to them to say whether any of them had existed from time immemorial; and the jury found for the defendant.

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Scarlett moved in last *Michaelmas* term to set aside the verdict and grant a new trial, on the grounds, 1st, that the varying payments shewed that there was no regular modus in the parish, and therefore the action was maintainable. But, 2dly, if a customary mode of tithing by setting out the 11th hillock of hay, on account

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of its being in a more advanced state of preparation, were established; yet as the defendant had not set out his hay according to the custom, he was liable in this action.

*Park, *Topping*, and *Richardson*, shewed cause against the rule. The stat. 2 & 3 *Ed.* 6. *c.* 13. only gives the action for not setting on *the tenth part*, that is, the common law tithe; and the plaintiff's claim on the record is framed accordingly: whereas, the terrier, which was given in evidence by the plaintiff himself, established a custom to set out the 11th cock of hay only; to which that statute does not apply. [Lord *Ellenborough*, C. J. How does it appear that the jury have found any certain modus in this case? It is true that the defendant was not tied down to prove any particular modus; but in order to oust the rector of his common law right, there must be some one good modus proved: but here there was only proof of varying payments from time to time, which is no proof of a modus, but of different compositions for tithe.] The rector himself claimed the 11th cock, and gave the terrier in evidence of it: he ought therefore to have been nonsuited upon that proof. [Lord *Ellenborough*, C. J. He went into evidence, and failed to establish the customary claim set up: then he was to lose his common law right, if no certain modus was proved? Laying the terrier out of the question, there was no evidence of a claim to the 11th part; but evidence of other varying payments. [*Le Blanc*, J. The question is whether the terrier conclusively proved the customary mode of tithing. It is one mode of proof, but not conclusive; and therefore did not go to a nonsuit.] None of the witnesses knew of any payments in kind of tithe, but all spoke of one or other customary mode of payment.

Lord ELLENBOROUGH, C. J. If the plaintiff cannot maintain his right to the tithe, he is not entitled to maintain this action, in

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which he claims to recover the penalty against the defendant for not setting out the tenth part. He endeavoured at the trial to cut down his own action, but could not succeed: for he cannot destroy his common law right without shewing some other certain right in the place of it. He gave in evidence a terrier shewing a custom for the rector to take only the 11th part; but the parol evidence first offered did not establish it, and the rest of the evidence went to contradict it: the result was that no certain modus or customary payment was proved; and consequently the rector must be entitled to his common law tithe.

GROSE, J. The clergyman is either entitled to his common law tithe, or to some certain thing in lieu of it. There was no certain

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customary substitution proved, and therefore he was entitled to his tithe at common law.

LE BLANC, J. If the question had been left to the jury, and they had found that the plaintiff was entitled to the 11th part, that would have been an answer to the action. But if that question were not left to them, and they have not found any certain modus, he is not to be turned round merely because there was some evidence, but only evidence, of a modus to take the 11th part in a more perfect state. The question, however, was not left to them; and therefore there must be a new trial.

BAYLEY, J. assenting,

Rule absolute.

BRANSCOMBE *against* HUGHES, in Error.

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Monday, May 11th.

After the rule to certify the record in error has run out, the defendant in error may sue out his writ of scire facias quare executionem non, &c. though the transcript was not then actually delivered, and filed as it ought to have been.

THIS was a rule upon the defendant to shew cause why the scire facias quare executionem non, &c. issued by him, and all subsequent proceedings, should not be set aside for irregularity, with costs. A writ of error was issued this term by the plaintiff in error, upon a judgment recovered by the defendant in *C. B.* On the 18th of *April* the defendant's attorney was served with a copy of the allowance of the writ of error; and a copy of the rule to certify the record was served on the plaintiff's attorney on the 22d. The scire facias quare executionem non, &c. was issued on the 2d of *May*, returnable the 3d, (in order to get a return of nihil;) and on the 6th of *May* the plaintiff's attorney applied at the office of the clerk of the Errors of *C. B.* and was informed that the transcript of the record was not delivered out of the office till the 4th of *May*: by which, if cognizable in that mode, it would have appeared that the scire facias was sued out and returnable before the transcript of the record was actually brought into this Court. But

The Court said that there being nothing on the record to instruct them when the transcript was brought into Court, they would either take it as returned generally of the term, or would look at the day when the rule to bring in the transcript was returnable, and would presume that it was brought in on that day: and therefore

Discharged the Rule (*a*).

(*a*) Vide *Wright* v. *Peckham*, ante, 204.

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Comyn, in support of the rule, referred to *Goodright* v. *Hugoson* (*a*) and *Sambridge* v. *Hanseley* (*b*), to shew that till the transcript is actually filed, the writ of scire facias, &c. cannot issue; though if the record be actually transcribed and brought into court before the eight days' rule has run, the defendant in error may proceed upon it immediately.

Marryat and *Heath*, contrà.

(*a*) *Rep. temp. Hardw.* 351. The Court gave no positive opinion in this case, which ultimately passed by consent to avoid delay. And see 2 *Impey's Pract.* 794. 7th edit.

(*b*) 2 *Term Rep.* 17.

Monday, May 11th.

SPENCER *against* HOLLOWAY.

If a defendant lodge within the jurisdiction of the *Southwark* Court of Conscience Act, 22 *G.* 3. c. 47., having conusance of causes to the amount of 5*l.* by stat. 46 *G.* 3. *c.* 87., though he carry on his business, and the goods were delivered out of the jurisdiction, and the plaintiff had no knowledge of his lodging within it till after the process was sued out; yet he is within the statute.

THE Court made a rule absolute, on the motion of *Jekyll*, after hearing *Garrow*, contrà, for entering a suggestion on the roll, pursuant to the *Southwark* Court of Conscience Acts, 22 *Geo.* 2. *c.* 47 and 46 *Geo.* 3. *c.* 87. (local), that the damages recovered did not amount to 5*l.*; under these circumstances. The process issued for 5*l.* 9*s.* 9*d.* for beer delivered to the defendant, who carried on the business of a blacksmith in *Middlesex*, out of the jurisdiction of the *Southwark* Court, at which place the beer was delivered: and it was not till after the process was served that the plaintiff knew that the defendant lodged in the parish of *St. Mary, Lambeth*, in *Surry*, within the jurisdiction.

END OF EASTER TERM.

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ALIEN AND ALIEN ENEMY.

1. The *British* agent effecting a policy of insurance on behalf of alien enemies, who became enemies after the loss happened, but before the action commenced, is entitled to recover against the underwriter, who had only pleaded the general issue; for such temporary suspension during the war of the assured's right of suit upon a contract, legal at the time, and liable to be enforced upon the return of peace, cannot be taken advantage of under a plea of a perpetual bar; there being no legal disability to sue in the plaintiff on the record. *Flindt* v. *Waters*, *E.* 52 *G.* 3. 260

2. A trading licence from the crown to *British* merchants to send a ship in ballast to an enemy's port, there to receive and load a cargo, and import it into this country, by legalizing the purchase by the subject, legalizes the sale by the enemy, and impliedly legalizes the vendor enemy's right to stop the goods in transitu after their arrival in port here, upon the intermediate insolvency of the vendees, after a part payment only, (which was offered to be refunded) and also to employ an agent here for that purpose: and such agent having possessed himself of the goods, the assignees of the bankrupt vendees cannot recover from him the value of them in trover. *Fenton and Another, Assignees of R. and T. Rennards, Bankrupts*, v. *Pearson and Another*, *E.* 52 *G.* 3. 419

3. A licence granted by the crown to *B. P.* and *C.* (who were in fact *British* merchants residing here, but were not so expressed to be in the licence) on behalf of *themselves* AND OTHERS, to export goods on board a certain vessel, bearing any flag except the *French*, from *London* to *any* port of the *Baltic*, (of which most were at that time hostile, but some were neutral,) will not warrant an export of goods which were the property at the time of the shipment of an alien enemy, a *Russian* subject, residing at *Petersburgh*, then a hostile port of the *Baltic*, to which place the cargo was consigned, and at whose desire the licence was obtained by *P.*, *B.* and *C.*: and therefore a policy effected on such goods by such ship from *London* to *Petersburgh* in the names of *British* agents here, who averred the interest to be in the *Russian* alien enemy, was held bad: and that such policy was also un-

available to cover a loss occasioned by the seizure and condemnation of the assured's own government after the arrival of the ship and cargo at *Petersburgh*. *Mennett* v. *Bonham*, *E.* 52 *G.* 3. 477

4. From a licence to *A.* and *B.* (who were in fact *British* merchants residing here) to export goods in a certain ship to *any* port in the *Baltic not blockaded*, and to *whomsoever the property might appear to belong*, the majority of the Court did not sufficiently collect the intention of the crown to cover the property of enemies, shipped from hence to an enemy's port; some ports in the *Baltic* being neutral at the time, though most of them were hostile. *Flindt* v. *Crokatt*, *E.* 52 *G.* 3. 522

5. Whether or not a licence under the stat. 48 *G.* 3. *c.* 126. to *G.* and *F.* of *London*, merchants, on behalf of themselves *and others*, to export on board a certain vessel, bearing any flag except the *French*, a cargo of *British* manufactures and colonial produce, from *London* to *Archangel*, and to import from thence a cargo on board the said ship of such goods as might lawfully be imported, would warrant an exportation of the goods licensed by a *Russian* purchaser here, *Russia* being then hostile; at all events, if such *Russian* owner and alien enemy insure the goods on the voyage from *London to Archangel*, and they be seized and condemned by his own government on their arrival, he cannot recover, by the opinion of a majority of the Court. *Flindt* v. *Scott*, *E.* 52 *G.* 3. 525

ANNUITY.

1. Where an annuity was granted by *three*, one of whom was known to be only a surety for the other two, to whose use the consideration-money was in fact applied; yet all three being present when the money was paid down upon the table, and counted over by them all, and the receipt of it signed by all, it was properly stated in the memorial as a payment made to the three.

And though the deed and memorial stated the consideration-money to have been paid by the grantee by the hands of *W.* his agent, yet as it also appeared by the same instruments that a part of it was the money of a third person; that was held to be no objection: for either *W.* was the agent in fact of the sole grantee, or impliedly the agent, through the medium of the grantee, for such third person also, whose interest was stated in the deed and memorial according to the truth. *Cook* v. *Jones*, *Reeve*, *and Benwell*, *H.* 52 *G.* 3. 237.

2. And one stamp as for one annuity is sufficient. *ib.*

3. A deed granting an annuity within the time included by relation back in the property tax act 46 *G.* 3, *c.* 65., reciting the agreement for the purchase at a certain price of a certain annuity, *free from the property or income tax*, and covenanting for the payment of it *without any deduction in respect to the property or income tax*, or other parliamentary taxes, &c. is not void in toto, but only to the extent of such disallowance. *Howe* v. *Synge*, *E.* 52 *G.* 3. 440

APPEAL,

See CONVICTION, 2. 4.

1. Where overseers' accounts were not allowed till the last day, when an effective notice of appeal to the then next sessions could have been given, and it did not appear when the party objecting had notice of such allowance; held that neither under the stat. 43 *Eliz.* *c.* 2, *s.* 6., nor under the stat. 17 *G.* 2. *c.* 38. *s.* 4., (supposing the latter to be a repeal of the other as to giving an appeal to the *next* sessions after the

verification and allowance of such accounts, instead of giving the appeal generally as the stat. of *Elizabeth* does,) was the appeal too late to the next subsequent sessions, for which an effectual notice of appeal could be given; particularly where there seemed to be management to defeat the appeal. *The King* v. *The Justices of Dorsetshire, H. 52 G.* 3. 200

2. The party objecting to a poor's rate may appeal to the next sessions, for which he is in time to give an effective notice of appeal after the publication of the rate, and one intervening day between such publication and the next immediate quarter sessions is not sufficient time for the purpose. *The King* v. *The Justices of Sussex, H. 52 G.* 3. 206
3. Several parties having a joint grievance, such as the omission of persons in the rate who ought to be rated, may join in giving one notice of appeal to the parish officers. *ib.*
4. An appeal against a poor's rate in *London* or *Middlesex* must be made, as in all other counties, to the next (*i. e.* next practicable,) "general *quarter* sessions;" though the stat. 17 *G.* 2. *c.* 38. *s.* 4., in its terms gives the appeal to the next *general* OR *quarter* sessions; it appearing from other parts of the act, as well as from other acts in pari materiâ, that those terms are used synonymously; and though in the two counties named there are four *general*, as well as four *general quarter* sessions. *The King* v. *The Justices of London, E. 52 G.* 3. 632

APPRENTICE,

See SETTLEMENT BY APPRENTICESHIP.

1. Quære whether a person, not having served as apprentice to the trade of a miller, embarking his capital in a mill, which he superintends, and and derives the profits of, through the agency of a foreman statutably qualified, to whom he gives directions as to the order in which the the corn of several customers shall be ground; but no otherwise interfering in the management, and never engaging in the *manual* exercise of the trade; be liable to the penalty given by the stat. 5 *Eliz. c.* 4. *s.* 31, 32. *Keen* v. *Dormay, H. 52 G.* 3. 161
2. Exercising a trade for seven years, without molestation, exempts from the penalty of the act. *Wallen v. Houlton*, in 1759, before all the Judges. *ib.* 165

ARBITRATOR,

See AWARD.

ASSUMPSIT,

See PRACTICE, 7. PRINCIPAL AND AGENT.

1. Where one of two partners drew bills of exchange in his own name, which he procured to be discounted with a banker, through the medium of the same agent who procured the discount of other bills drawn in the partnership firm with the same banker; the latter has no remedy against *the partnership*, either upon the bills so drawn by the single partner, or for money had and received through the medium of such bills; though the proceeds were carried to the partnership account; the money being advanced solely on the security of the parties whose names were on the bills *by way of discount*, and not by way of loan to the partnership; and though the banker conceived at the time that all the bills were drawn on the partnership account. *Emly and Others, Assignees of Borough, a Bankrupt*, v. *Lye and Another, H. 52 G.* 3. 7
2. A material alteration in a sale-note by the broker, after the bargain made, at the instance of the seller, without the consent of the purchaser, annuls the instrument, so

as to preclude the seller from recovering upon the contract, evidenced by the instrument so altered by him. *Powell* v. *Divett*, *H.* 52 *G.* 3. 29

ATTAINDER.

An attainted felon having been discharged by order of the secretary of state, under the sign manual, signifying his majesty's pleasure to grant him an unconditional pardon, and directing his name to be inserted in the next general pardon, (of the issuing of which pardon there was some negative evidence,) and having afterwards purchased a copyhold for more than 30*l.* to which he was admitted upon surrender formally made, and resided on and received the issues and profits of it for nine years without impeachment of his title; gained a settlement by such residence thereon for forty days, and communicated such his settlement to an unemancipated child, part of his family. *The King* v. *The Inhabitants of Haddenham*, *E.* 52 *G.* 3. 463

ATTORNEY,

See ACTION ON THE CASE, 3. BANKRUPT, 4.

ATTORNEY, WARRANT OF,

See WARRANT OF ATTORNEY.

AWARD.

1. Where an award appears to have been made out of the time originally given to the arbitrator by the rule of Court, but which rule reserved to him the power of enlarging the time; it is not enough for obtaining an attachment for non-performance of the award, that the arbitrator states in his award that he had enlarged the time, without verifying the fact by affidavit; and it should also appear that the defendant had notice of such enlargement of the time within which the award was made when served with the rule for the attachment. *Davis* v. *Vass*, *H.* 52 *G.* 3. 97
2. Under a submission to an arbitrator of all matters in difference between landlord and tenant, the arbitrator awarded, inter alia, that a stack of hay, left upon the premises by the tenant, should be delivered up by him to the landlord by a certain day, upon the tenant being paid or allowed a certain sum in satisfaction for it: Held that the property in the hay did not pass to the landlord on his tender of the money, by the mere force of the award, against the consent of the tenant, who refused to accept the money or deliver up the hay; and therefore that the landlord could not maintain trover for it; but his remedy was upon the award. *Hunter* v. *Rice*, *H.* 52 *G.* 3. 100
3. Where in an action by the assignee of a bankrupt the petitioning creditor's debt was to be proved by a deed of reference between himself, the bankrupt, and others, their partners, of all accounts between them, or any two of them; and by an award (inter alia) of the separate debt of above 100*l.* due from the bankrupt to the petitioning creditor, who was also the assignee; held that it was not sufficient to prove the execution of the deed by the petitioning creditor and the bankrupt, without proving also the execution by the other partners, (by whom it appeared on the face of it to have been also executed;) for the consideration to each to execute his own submission was the submission of all the others, and without proof of that, the arbitrators had no authority to make their award between any of the parties. *Antram, Assignee of Hawkes, a Bankrupt*, v. *Chace and Others*, *H.* 52 *G.* 3. 209
4. Disputes existing between the master and owner of a ship touching the ship's accounts on a certain voyage,

they referred all actions and causes of actions to arbitrators, who awarded a balance to be paid by the owner to the master: held that upon a rule for an attachment for non-payment of the sum awarded, it was not competent to the owner to claim a deduction of a certain sum, the price and proceeds of certain goods shipped on their joint account, the whole of which price had been paid by the owner in the first instance, on the ground that that particular adventure formed no part of the disputes between them, and had not been submitted to nor taken into the consideration of the arbitrators; because it was plainly within the terms and scope of the reference, the direct object of which was to make a final settlement of all matters of account between the parties; and it was the owner's own fault if he kept back that item of the account. *Smith* v. *Johnson*, *H.* 52 *G.* 3. 213

5. Arbitrators may choose an umpire either before or after the time limited for making their own award, if the umpire be chosen within the time limited for his umpirage. *Harding* v. *Watts*, *E.* 52 *G.* 3. 556

BAIL.

See BANKRUPT, 6.

1. The Court on application by the bail of the defendant, who was in custody on a charge of obtaining money upon false pretences, will grant a writ of habeas corpus to the gaoler, to bring him up, in order that he may be rendered in discharge of his bail. *Daniel* v. *Thompson*, *H.* 52 *G.* 3. 78
2. The plaintiff may abandon an attachment obtained against the sheriff, and take an assignment of the bail-bond, and proceed thereon. *Pople* v. *Wyatt*, *H.* 52 *G.* 3. 215
3. Where the proceeding upon the recognizance of bail is *by action*, the plaintiff is entitled to the costs of such action commenced after a return of non est inventus to the to the capias ad satisfaciendum against the principal, though the bail rendered their principal before the eight days allowed by the practice of the Court after the return of the process against the bail. *Hughes and Another* v. *Poidevin*, *H.* 52 *G.* 3. 254
4. The sheriffs of *London* to whom, as such, a writ of special capias was directed, under which they arrested the plaintiff, cannot be sued for damages for not having taken bail for his appearance, according to the stat. 23 *H.* 6. *c.* 9.; the *sufficiency* of the bail tendered being only alleged to be *within* Middlesex *and* London, *taken together;* though it was also averred that from time immemorial the same persons had always been duly appointed to, and had exercised the office of sheriff of the two counties at the same time, and that the defendants were sheriffs of both at the time of the grievance complained of. The stat. 23 *H.* 6. *c.* 9, being a public act, need not be specially pleaded. *Lovell* v. *Sir William Plomer*, *Knt. and S. Goodbehere*, *Sheriffs of the city of London*, *E.* 52 *G.* 3. 320
5. Where the plaintiff had taken a cognovit from the defendant, with an agreement to receive the debt by long instalments; of which no notice was given to the bail; the Court set aside an execution against the bail, sued out above a year after the judgment, without a scire facias to revive it: even if the agreement by the plaintiff to take the debt by instalments, without the consent of the bail, would not have discharged them; as they could not after that have rendered their principal. *Thomas* v. *Young and Joggett*, *bail of Graham*, *E.* 52 *G.* 3. 617

BANKERS.

A banker has a lien for the amount of his balance upon money securities

paid in by a customer on his running account, and the banker's assignees, after his bankruptcy, may sue the drawer of one of those securities which was made payable to bearer, who defended the action on behalf of the customer, and recover against such drawer the amount of the balance; and this notwithstanding an offer made to the assignees on the part of the customer, before the action brought, that he was not aware of the exact balance, but that *if any were due, he was ready to pay it*, on receiving back the security; for this was no tender of the balance to defeat this action. *Scott and Others, Assignees of G. M. Jukes, J. Langley, and E. Jukes, Bankrupts*, v. *Franklin*. 428

BANKRUPT.

See EVIDENCE, 4. OR AWARD, 3.

1. The stat. 21 *Jac.* 1. *c.* 19. *s.* 11, only transfers to the assignees of a bankrupt such goods as by the consent of the true owner the bankrupt has in his possession *at the time of his bankruptcy*. Therefore, where the purchaser of goods, lying at a wharf in the name of the seller, received from him at the time of sale an order on the wharfinger for the delivery of the goods, but suffered them to remain in the name of the seller for several months after, during which time the seller disposed of a part thereof; but upon notice of the seller's insolvency the purchaser carried the order to the wharfinger, and had the goods transferred into his own name; and nine days after that the seller became bankrupt; held that the assignees of the bankrupt were not entitled to these goods; for there was a complete transfer of the possession before the bankruptcy. *Jones and Another, Assignees of Mingay and Co. Bankrupts*, v. *Dwyer and Another, H.* 52 *G.* 3. 21

Quære whether the statute would, at any rate, have extended to goods the joint property of two traders but deposited at the wharf in the name of one only, who after such sale in his own name, became bankrupt. *Jones and Another, Assignees of Mingay and Co., Bankrupts*, v. *Dwyer and Another, H.* 52 *G.* 3. 21

Quære also whether a broker, who sells goods and receives the money for them on account of his principal, can controvert his title to the goods in an action brought against him by the principal for the money. 21

2. A tenant having committed an act of bankruptcy in October 1810, upon which a commission issued on the 21st of January 1811, and the sheriff having on the 7th of January levied an execution at the suit of the landlord for a judgment debt of 600*l.* under which he sold the goods of the tenant on the 21st and 22d of January, for 520*l.*, and out of that sum, when received, paid the landlord 140*l.* for one year's rent in arrear: held in an action for money had and received, brought by the assignees of the bankrupt tenant against the sheriff to recover the whole amount of the sum levied, that the property in the goods being changed by the act of bankruptcy and commission, and transferred to the assignees, it lay upon the sheriff to prove that he had paid over the money to the landlord and execution creditor before he had notice of the commission issued; and not giving such proof that he was liable for the amount to the assignees; and that he was not entitled to deduct the 140*l.* paid over to the landlord, as for the year's rent in arrear, under the stat. 8 *Ann. c.* 14. *s.* 1., a commission of bankrupt not being an *execution* within the meaning of that statute, which directs that no goods upon demised premises shall be taken by virtue of any *execution*, unless the execution cre-

ditor shall, *before the removal of such goods from off the premises*, pay to the landlord all arrears of rent, not exceeding a year's rent. *Lee and Another, Assignees of Hill, a Bankrupt*, v. *Lopes, Bart.*, *H.* 52 *G.* 3. 230

3. The fourth, amongst several other signatures of creditors to the certificate of a bankrupt, having been obtained by the promise of the bankrupt to pay that creditor his whole debt, such certificate is void by virtue of the stat. 5 *Geo.* 2. *c.* 30. *s.* 7. 11. although the creditors who signed before and after the fourth were sufficient in number and value, without reckoning that one; for his example might have induced others to sign it. *Phillips* v. *Dicas, one, &c., H.* 52 *G.* 3. 248

4. The attorney employed by the petitioning creditor before the choice of assignees, and continued by the assignees afterwards, having delivered his bill to the assignees, including all the charges incurred by order of the petitioning creditor in the first instance, and having received a certain sum, on account of his bill generally, from the assignees, is bound, as the assignees themselves were, by the 25th section of the act, to appropriate the sum so received in reduction of the charges incurred by order of the petitioning creditor, and for which he was originally responsible; and therefore the amount of such charges, covered by the sum so received, cannot be set off by the attorney against a debt due from him to the petitioning creditor on his own account. *ib.*

5. A deed of composition, framed only for the *joint* creditors of two bankrupts, under which seven of the joint creditors, whose debts exceeded 2000*l.* accepted of the proffered composition of 3*s.* in the pound, but which was not signed or accepted by three other joint creditors, whose debts amounted to 92*l.*, nor by the separate creditors of one of the bankrupts, is not such a "*compounding with his or their creditors*," as will within the statute 5 *Geo.* 2. *c.* 30. *s.* 9, avoid the effect of a subsequent certificate, under a commission of bankrupt, to protect the future estate and effects as well as person of one of the bankrupts, who was afterwards sued to judgment, and had execution levied on his goods, by one of his separate creditors. *Norton* v. *Shakespeare*, *E.* 52 *G.* 3. 619

6. To scire facias against bail upon their recognizance, it is competent to the defendant to plead in bar against the issuing of execution, that before the issuing of the alias writ of scire facias the plaintiff became bankrupt, and a commission issued against him, on which he was declared a bankrupt before the return of the writ, and his effects, debts, &c., assigned to the provisional assignee, who before plea pleaded assigned to the assignee under the commission, who was entitled to sue the defendants, &c. *Kinnear* v. *Tarrant and Another*, *E.*52 *G.* 3. 622

BARON AND FEME,

See HUSBAND AND WIFE.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. Where one of two partners drew bills of exchange in his own name, which he procured to be discounted with a banker through the medium of the same agent, who procured the discount of other bills drawn in the partnership firm with the same banker, the latter has no remedy against *the partnership*, either upon the bills so drawn by the single partner, or for money had and received through the medium of such bills; though the proceeds were carried to the partnership ac-

count; the money being advanced solely on the security of the parties whose names were on the bills *by way of discount*, and not by way of *loan* to the partnership; though the banker conceived at the time that all the bills were drawn on the partnership account. *Emly and Others, Assignees of Burrough, a Bankrupt*, v. *Lye*. *H.* 52 *G.* 3. 7

2. A bill of exchange having been accepted, payable at *Ladbroke's*, with a direction in writing on it, "*in case of need to apply at* Boldero's," and having been dishonoured when due at *Ladbroke's*, and thereupon brought to *Boldero*, who thinking that it had been made payable at his house, under that mistake cancelled the acceptance; but presently, observing the mistake, wrote under it "*cancelled by mistake*," and signed his initials to it, yet nevertheless paid the bill for the honour of the plaintiffs, whose indorsement was on it: held that the plaintiffs, on proof of such cancellation by mistake, might recover upon the bill against prior indorsers. *Raper* v. *Birkbeck*, *H.* 52 *G.* 3. 17

3. Where a bill was drawn, accepted, and indorsed by several indorsers, for the accommodation of the last indorser, and the acceptor had no effects of the drawer in his hands, but that the fact was not known to the defendant, one of the prior indorsers: held that the defendant was entitled to notice of the dishonour, before the holder could maintain an action against him, in order to enable him (even if he had no remedy upon the bill) to call immediately upon the last indorser, to whom, in fact, he had lent the security of his indorsement, without value received, and who had in fact received the money upon that security. *Brown* v. *Maffey*, *H.* 52 *G.* 3. 216

4. Where a bill was drawn and accepted for the accommodation of the indorser, which was not duly presented for payment when due, by reason that the bill having been accepted payable at a banking-house was not presented till after the banking hours, when the answer given to the holder was "no effects;" yet if such indorser apply to the indorsee, after declaration filed, for further time to make payment of the bill; which declaration alleged the fact that the bill was duly presented for payment; that is evidence of a waver of the objection, with notice of the fact, of which he had the means of informing himself. *Hopley* v. *Dufresne*, *E.* 52 *G.* 3. 275

5. The indorsee of a bill having lodged it with his banker in *London*, who presented it for payment at another banking-house in *London*, where it was made payable on the 25th of *February*, when it was dishonoured; but under a doubt whether the presentation was not made too early on that day, the banker again presented it shortly before 5 o'clock on the 26th, when it was again dishonoured; on which he immediately returned it to the indorser in *London*, on that day, and sent notice of the dishonour by the post of the 27th, into the country where the indorser lived: held that this was due diligence and due notice of the dishonour. *Langdale and Another* v. *Trimmer*, *E.* 52 *G.* 3. 291

6. A bill drawn on the 1st of *August*, at two months, by *A.* on *B.*, payable to the order of the drawer, and accepted and re-delivered by *B.* as a security for a debt, and kept by *A.* for 20 days, cannot be altered in its legal effect by bringing forward the date to the 21st, without a new stamp; though by the consent of the acceptor, and before indorsement and delivery to a third person; the alteration not being made to correct a mistake in the original form of the bill, which was drawn conformably to the original intention of the parties, and avail-

able in that form. *Bathe* v. *Taylor*, *E.* 52 *G.* 3. 412

BRIDGE.

The justices of *Dorset* having under the stat. 43 *G.* 3. c. 59., contracted for the building of a new bridge in a different site, in lieu of the old one, which was ruinous; and having directed the old bridge to be taken down before the new one was passable, for the benefit of the old materials to be used by the contractor in finishing the new bridge; this Court refused a writ of prohibition to them to restrain them from pulling down the old before the new bridge was passable; though there were strong affidavits of the inconvenience and loss to be sustained by the neighbourhood, in being obliged to use a round-about way in the interval: referring the complainants to the ordinary remedy by indictment, if the pulling down the old bridge, under these circumstances, were a nuisance; and seeing no occasion to interfere by applying a prompt remedy of a novel kind in modern practice. *The King* v. *The Justices of Dorset and Others*, *E.* 52 *G.* 3. 594

BROKER.

See PRINCIPAL AND AGENT.

CAPTAIN OF KING'S SHIP,

See ACTION ON THE CASE, 2.

CERTIORARI,

See CONVICTION, 2, 5. COSTS, 4.

CHARITABLE USE,

See SETTLEMENT BY ESTATE, 1.

COAL,

See CONVEYANCE, 2.

COMMON.

Common appurtenant may be claimed, as well by grant within time of memory, as by prescription; and after a unity of possession in the lord of the land, in respect of which the right of common was claimed with the soil and freehold of the waste, proof that the lord's tenant of the land had for 50 years past enjoyed the right of common on the waste is evidence for the jury to presume a new grant of common as appurtenant, so as to support a count in an action by the tenant for surcharging the common, declaring upon his *possession* of the messuage and land, with the appurtenances, and that by reason thereof he was entitled of right to the common of pasture, *as belonging and appertaining* to his messuage and land; and also to support another count, in substance the same, alleging his possession of the messuage and land, and that *by reason thereof* he was entitled to common pasture, &c. *Cowlam* v. *Slack*, *H.* 52 *G.* 3. 108

CONFISCATION,

See INSURANCE, 11.

CONTRACT,

See AGREEMENT.

CONUSANCE.

Claim of conusance by the university of *Oxford* was allowed in an action of trespass against a proctor, a pro-proctor, and the marshal of the university; though the affidavit of the latter, describing him as of a parish in the suburbs of *Oxford*, only verified that he then was and had been for the last fourteen years a common servant of the university called marshal of the university; and that he was sued for an act done by him in discharge of his duty, and in obedience to the orders

of the other two defendants, without stating that he resided within the university, or was matriculated. *Thornton* v. *Ford and Serle, Clerks, and Holliday*, *E.* 52 *G.* 3. 634

CONVEYANCE,

See COVENANT.

1. An act passed in the 14 *Geo.* 2. enabling *T. S., lord of the manor* of *F.*, his heirs and assigns, at their costs, to convey water in pipes from his estate there to *Portsmouth*, and through the streets, and for that purpose to break up the pavement, making good the same again, is not repealed by the act of the 32 *Geo.* 3. passed above 50 years afterwards, vesting the property and control of the pavement in commissioners, without exception of the former right; the two acts not being inconsistent, but giving the several powers to be exercised for different purposes. And the water-works, &c. together with the powers under the first act, may be afterwards executed by the assigns of *Smith*, to whom the same, apart from the manor, were conveyed by mesne assignments: though such powers had lain dormant since seven years after the passing of the act, till the 49 *Geo.* 3. But if *Smith's* assigns break up the pavement for the purpose of executing the powers reserved to them, without restoring it again, they are amenable either by indictment, or by action, for the injury done to the property of the commissioners. *Goldson* v. *Buck*, *E.* 52 *Geo.* 3. 372

2. *A.* conveyed to *B.* in fee a messuage, buildings, yard, gardens, and homestead, with the appurtenances, and certain closes of land, *excepting* all mines of coal under the said lands and hereditaments; with liberty to enter and sink pits for getting *all* such coal, and to erect engines and make drains, &c. necessary for working the coal; *except* as to such lands as lie within 150 yards of the messuage and buildings, and *except* any *homestead*. Held that the seller thereby reserved to himself the right to dig coals under the messuage, buildings and homesteads, and within 150 yards of the same respectively; but was not entitled to sink pits, erect engines, or make drains within 150 yards of the messuage or buildings, or within the homestead. *Bowler* v. *Woolley*, *E.* 52 *Geo.* 3. 444

CONVICTION,

See GAME, 3.

1. The mere fact of keeping a sporting dog is no evidence of keeping it for the purpose of destroying the game, without some evidence of its being used for that purpose. *Read* v. *Phelps*, *E.* 52 *Geo.* 3. 271

2. The stat. 48 *Geo.* 3. *c.* 74. *s.* 15., giving to the party grieved an appeal to the sessions against a conviction by justices of the peace for penalties incurred in respect of the duties on malt, and empowering the sessions "to hear and *finally* determine of and concerning the truth "of the facts and merits of the case "in question *between the parties* "to such conviction respectively;" and after enabling the sessions to amend defects of form enacting, in the same clause, that no certiorari shall be allowed to set aside the determination of the sessions; and providing that upon such appeal the sessions shall re-hear, re-examine, and reconsider the truth of the facts and merits of the case, &c. and re-examine the same witnesses as before, and no other; does not preclude the crown from removing, by certiorari, the conviction, and the order of the sessions quashing the same. *The King* v. *Allen*, *E.* 52 *G.* 3. 333

3. And this Court will take cognizance of a case reserved by the ses-

sions, accompanying the conviction and the proceedings so removed. *ib.*

4. And where the sessions, upon proof that the appellant had received from the clerk of the convicting magistrates a copy of his conviction, signed and sealed by such justices, purporting, on the face of it, to have been made *upon the information of* B. *and* C.; (though such copy was drawn up on the back of the paper which contained the information of *A.* the true informer; *B.* and *C.* being only the witnesses who had been examined in support of the charge; and though the same justices had returned to the sessions to be filed of record a regular conviction of the same date, signed and sealed by them, on parchment; stating it to have been made on the information of *A.*, and supported by the evidence of *B.* and *C.*, according to the truth of the case;) had quashed the latter conviction so returned by the justices, as being at variance with the minutes of the conviction delivered to the appellant. without entering into the merits of the case, upon a preliminary objection taken by the appellant; this Court quashed the order of sessions generally; thereby setting up again the regular conviction; considering that the variance arose from the mere mistake and irregularity of the justices' clerk; and that the appellant was not really surprised by it, but had waved his appeal on the merits. *ib.*

5. The certiorari to remove a conviction of a glassmaker on the stat. 18 *G.* 2. c. 18. *s.* 5. is not taken from the crown, though it be from the defendant; the act being levelled against *vexatious* delays. *Rex* v. *Tindal*, 1654, cited *ib.* 339

6. A conviction on the game laws, which, in negativing the qualifications of the defendant under the stat. 22 and 23 *Car.* 2. c. 25. *s.* 3. only alleged that *the defendant* had not, at the time of the offence committed, "lands or tenements, or any other estate of inheritance of the clear yearly value of 100*l.*, or for term of life, &c., or was in any other manner qualified," &c. is not sufficient, without also specifically negativing that he had an estate of inheritance of the clear yearly value of 100*l. in right of his wife.* But it is sufficient to state he kept and used a dog called a lurcher to kill and destroy the game. *The King* v. *Earnshaw*, *E.* 52 *G.* 3. 456

7. A groom attending his qualified master while using dogs for killing the game, and pursuing it by his master's command, is not liable to the penalty of the stat. 5*Ann.* c. 14. *The King* v. *Taylor*, *E.* 52 *G.* 3. 460

8. The stat. 5 *W.* & *M.* c. 11. *s.* 2. providing for costs to be paid by a defendant removing an indictment into *B. R.* by certiorari, if he be *convicted*, means *convicted by judgment*. *The King* v. *Turner*, *E.* 52 *G.* 3. 570

CONVOY ACT.

An admiralty licence, obtained under the convoy act 43 *G.* 3. *c.* 57. for a ship to sail without convoy, describing her as bound on a voyage to *Gibraltar*, when in fact she sailed from hence with instructions to make the best of her way direct to *Palermo*, without touching at *Gibraltar*, unless ordered into the bay by any cruizers which she might meet in passing by it, is fraudulent and void, and will not legalize an insurance, by the charterer of such ship sailing without convoy, upon goods put on board, and insured from hence to *Palermo*, &c. with liberty to proceed to any ports to seek convoy, &c., and therefore will not cover a loss which happened in the latter part of the voyage; though the ship did in fact go into *Gibraltar*, being compelled to it by stress of weather, against the master's in-

tentions, and though no convoy was to be procured there, nor licence to proceed without it. *Ingham* v. *Agnew*, *E.* 52 *G.* 3. 517

COPYHOLD,

See ATTAINDER.

COSTS,

See SESSIONS.

1. Though the Court may in a new ejectment stay proceedings between the same parties until the costs of a former ejectment, and also the costs of an action for mesne profits dependant thereon, are paid, yet they will not extend the rule to include the damages in the action for the mesne profits, however vexatious the proceedings of the present lessors of the plaintiff may have been. *Doe, on the Demise of Church and Another*, v. *Barclay*, *H.* 52 *G.* 3. 233
2. Where the proceedings upon the recognizance of bail is *by action*, the plaintiff is entitled to the costs of such action, commenced after a return of non est inventus to the capias ad satisfaciendum against the principal, though the bail rendered their principal before the eight days allowed by the practice of the Court after the return of the process against the bail. *Hughes and Another* v. *Poidevin*, *H.* 52 *G.* 3. 254
3. If a defendant lodge with the jurisdiction of the *Southwark* court of conscience act 22 *G.* 2. *c.* 47. having conusance of causes to the amout of *5l.* by stat 46 *G.* 3. *c.* 78. though he carry on his business and the goods were delivered out of the jurisdiction, and the plaintiff had no knowledge of his lodging within it till after the process was sued out; yet he is within the statutes. *Spenser* v. *Holloway*, *E.* 52 *G.* 3. 647
4. The stat 5 *W.* & *M.* *c.* 11. directing by *s.* 2. that no certiorari shall be granted on the part of a defendant to remove an indictment for a misdemeanor from the sessions before he shall enter into a recognizance, &c. in 20*l.* to try at the next assizes, &c.; and by *s.* 3. that "if the defendant prosecuting such certiorari be *convicted*, the Court of *K. B.* shall give reasonable costs to the prosecutor, and that the recognizance shall not be discharged till the costs taxed shall be paid; attaches only upon a defendant *convicted* by *judgment*; and therefore if, after a verdict of guilty, the judgment be arrested, no costs can be taxed for the prosecutor. *The King* v. *Turner*, *E.* 52 *G.* 3. 570
5. Where a plaintiff is put to declare in prohibition, and is nonsuited at the assizes, the defendant is only entitled to his single costs under the stat. 8 & 9 *W.* 3. *c.* 11. *s.* 3., and not to double costs under the stat. 2 & 3 *Ed.* 6. *c.* 13. *s.* 14. which latter only applies to cases where the party who is hindered of his suit in the ecclesiastical court by the prohibition acquiesces in it; and then the party obtaining it must within six calendar months verify his suggestions by the depositions of two witnesses in the court which granted the prohibition; otherwise the party hindered shall have a consultation and double costs and damages. *Trask* v. *French*, *Clerk*, *E.* 52 *G.* 3. 574

COURT,

See SOUTHWARK COURT.

COVENANT,

——of *Title*, *see* LEASE, 2.
——for *Freight*, *see* FREIGHT, 2, 3.

CUSTOM-HOUSE CLEARANCE.

It is no objection to the assured on goods recovering for a loss by a peril within the policy, that after

the captain had obtained his manifest and custom-house clearances, as required by stat. 13 & 14 *Car.* 2. *c.* 11. *s.* 3. goods of the assured were put on board by the packer, who had previovsly made all the necessary entries at the custom-house. *Carruthers* v. *Gray*, *H.* 52 *G.* 3. 35

DESCENT,

See DEVISE, 1.

DEVISE.

1. Upon a devise to the testator's wife *B.* of all his real and personal estate, &c. in trust for the education and maintenance of his only daughter *M.* till she arrives at the age of 21; and in case of M.'s death before she arrives at 21, then a devise of the whole of his said estates and effects to *B.* his wife; held that *M.* the daughter took a present limited fee, either by descent or by implication under the will, upon the contingency of her dying under 21; and that *B.* the mother took an executory devise in fee, which, upon her death before the daughter attained 21, descended to the daughter; and that the daughter afterwards dying before she attained 21, such executory interest, which did not unite with nor was merged or extinguished in the fee which she had ex parte paternâ during her life, descended to her heirs ex parte paternà. *Goodtitle*, *Lessee of Elizabeth Vincent*, v. *White*, *H.* 52 *G.* 3. 174

2. A testator being seised by the same title of of a messuage and 19 acres of land, including *Floodgate Meadow*, in the parish of *Mavesyn Ridware*, which parish consists of three townships, *Mavesyn Ridware*, *Blythbury*, *and Hill Ridware*; and having other property in *Hill Ridware*, and no where else; and the messuage in *Blythbury*, with two of the 19 acres there, being in the occupation of *T. W.*, and the rest of the 19 acres, being partly in the occupation of other tenants, and partly in his own; devised "all his messuage, with all "lands, hereditaments, and appur- "tenances thereto belonging, situ- "ate in *Blythbury*, in the parish of "*M. R.*, *now in the occupation of* "T. W., except *Floodgate Mea-* "*dow*:" held that the devise was not confined to lands in *Blythbury* then occupied by *T. W.*, but extended to all the lands in *Blythbury*, held under the same title with the messuage; and that the words "*now in the occupation of* "T. W." were to be transposed and applied to the messuage then occupied by *T. W.*; according to the fact; which transposition would render the whole consistent: whereas without it, the exception of *Floodgate Meadow* was nugatory, as that never had been in the occupation of *T. W.* And it was no objection to this construction that a residuary clause, giving all *other* the testator's real estate in *Mavesyn Ridware*, would have nothing to operate upon; the *Floadgate Meadow*, &c. and the property in the township of *Hill Ridware* being specifically devised in the same clause. *Marshall* v. *Hopkins*, *E.* 52 *G.* 3. 309

4. Under a devise to *E. F.* of "all my *estate and effects* whatsoever and wheresoever," in trust, to pay funeral expenses and debts; and then "subjecting my said *effects* bequeathed to *E. F.* to the following *legacies*," enumerating amongst these a gift to *W. S.* of "*the house his father now dwells in, at the decease of his said father*;" and giving to the father an annuity, and to the son a sum of money, and giving other pecuniary legacies; and then, after desiring all the above legacies to be "paid out of my *effects* by the said *E. F.*," giving "all the *rest and remainder* of my *said effects* to the said *E. F.*, her *heirs and assigns for ever*;"

held that *E. F.* took the remainder in fee in the house (which was the only real property possessed by the testatrix) after an estate for life by implication in the father, and a remainder for life only to the son: though the personal estate was sufficient to pay all the personal charges. *Doe, Lessee of Elizabeth Franklin*, v. *Trout*, *E.* 52 *G.* 3. 394

4. These words in a will, "I give and bequeath all that I shall die possessed of, real and personal, of what nature and kind soever, after my just debts paid. I appoint *P.* my *residuary legatee* and executor;" followed by certain annuities and legacies; with a desire to his legatee and executor to let his sister be interred in his (the testator's) vault, and with a recommendation to him to be kind to another relation, and to do something handsome for him at his death, &c., shew the testator's intention to make *P.* the residuary legatee of his real estate in fee. *Pitman* v. *Stevens*, *E.* 52 *G.* 3. 505

DISSENTERS.

1. Whether a person, *not having* "holy orders," (i. e. by episcopal ordination) or "pretended holy orders," (i. e. conferred by some form other than episcopal ordination, acknowledged by Protestant dissenters,) but being a candidate only for holy orders of one or other description, be entitled to require of the sessions to have the oaths administered to him, and to be allowed to make and subscribe the declarations required by the 8th section of the toleration act 1 *W. & M. c.* 18., within the further description in that section of a person "pretending to holy orders," to enable him to preach, &c. without incurring penalties; or whether these words are to be understood only of a person pretending actually *to have* some description of holy orders; at any rate it is not necessary that a person bringing himself within the true meaning of "pretending to holy orders," should also be the teacher or preacher of a separate congregation of Protestant dissenters: and the sessions having refused to admit a person to take the oaths, and make and subscribe the declarations, &c. because he had not the conjoint qualification, this Court granted a mandamus to them to administer to him the oaths, &c., or to enable them to make a special return of the grounds of their refusal. *The King* v. *The Justices of Gloucestershire*, *E.* 52 *G.* 3. 577

2. Under the toleration act, 1 *W. & M. c.* 18. *s.* 8., the justices in sessions have no authority to require of a person claiming to take the oaths and to make and subscribe the declarations, &c. therein mentioned, as a teacher of a separate congregation of Protestant dissenters, and to verify the same claim upon oath, that he should produce a certificate from two of his congregation, authenticating such his appointment, in compliance with a general rule before made at the sessions for that purpose. *The King* v. *The Justices of Suffolk*, *E.* 52 *G.* 3. 590

EJECTMENT,

See LANDLORD AND TENANT, 2.

Though the Court may stay proceedings in a new ejectment until the costs of a former ejectment between the same parties and also the costs of an action for mesne profits dependant thereon are paid; yet they will not extend the rule to include the damages in the action for the mesne profits, however vexatious the proceedings of the present lessors of the plaintiff may have been. *Doe, on the Demise of Church and*

Another, v. *Barclay*, *H.* 52 *G.* 3. 233

EVIDENCE,

See ATTAINDER. FRAUDS, STATUTE OF.

1. A material alteration in a sale-note by the broker, after the bargain made, at the instance of the seller, without the consent of the purchaser, annuls the instrument, so as to preclude the seller from recovering upon the contract evidenced by the instrument so altered by him. *Powell* v. *Divett*, *H.* 52 *G.* 3. 29
2. Entries of charges made by an attorney in his books, shewing the time when a certain lease prepared for a client of his was executed, which charges were shewn to have been paid, are evidence after the attorney's death, to shew that the lease executed under a power to lease in possession, and not in reversion, which lease bore date the 31st of August, 1770, and purported to grant a term *from the 29th of September then next ensuing*, was not, in fact, executed till after the 29th of *September*, inasmuch as the charge for drawing and engrossing the lease was under the date of "*October* 1770." *Doe*, *Lessee of Reece*, v. *Robson*. *H.* 52 *G.* 3. 32
3. Upon appeal against an order of removal, the appellant township, having produced one of its inhabitants as a witness, who being examined upon the voir dire stated that he was the occupier of a cottage there of the annual value of 25 shillings, but that he was not rated to nor paid any public rate or tax; such answer must be taken to be true for the purpose; and it cannot be objected to his examination in chief, that the best evidence of the fact was not given, by the production of the rate itself. *The King* v. *The Inhabitants of the Township of Gisburn*, *H.* 52 *G.* 3. 57
4. Where in an action by the assignee of a bankrupt the petitioning creditor's debt was to be proved by a deed of reference between himself, the bankrupt, and other their partners, of all accounts between them or any *two* of them, and by an award (inter alia) of a separate debt of above 100*l.* due from the bankrupt to the petitioning creditor, who was also the assignee: held that it was not sufficient to prove the execution of the deed by the petitioning creditor and the bankrupt, without proving also the execution by the other partners, (by whom it appeared on the face of it to have been also executed;) for the consideration to each, to execute his own submission, was the submission of all the others; and, without proof of that, the arbitrators had no authority to make their award between any of the parties, *Antram*, *Assignee of Hawkes*, *a Bankrupt*, v. *Chace and Others*. *H.* 52 *G.* 3. 209
5. Proof by one of a family, that many years before, a younger brother of the person last seised had gone abroad, and that the repute of the family was that he had died there, and that the witness had never heard in the family of his having been married, is primâ facie evidence that the party was dead without lawful issue, to entitle the next claimant by descent to recover in ejectment. *Doe*, *Lessee of Banning*, v. *Griffin*, *E.* 52 *G.* 3. 293
6. But in *Richards* v. *Richards*, *B. R. E.* 4 *G.* 2., where the lessor of the plaintiff in ejectment claimed as heir by descent, proof of the death of his elder brothers, without also proving that they died without issue, was held not sufficient. *cited ib.* 294
7. Where a pauper had served a master under unstamped articles o

agreement to work with him for three years, at certain rates of weekly wages, and under certain covenants; after which he had continued to serve his master for four years longer, without coming to any new agreement; though such unstamped writing cannot be received as evidence for the purpose of proving the agreement between the parties, yet the sessions may look at it for the purpose of seeing when it ceased to operate, in order to guide them in receiving parol evidence of service for the last four years, at wages, from whence the sessions might presume a yearly contract. *The King* v. *The Inhabitants of Pendleton*, *E.* 52 *G.* 3. 449

EXECUTION.

1. Where the late sheriffs of *London*, having taken the defendant's goods in execution under a writ of fi. fa. were ruled, on the 8th of *February* 1811, to return the writ; and returned on the 11th that they had the goods in hand for want of buyers; after which the plaintiff, without issuing a writ of venditioni exponas, lay by till after a commission of bankrupt against the defendant, founded on an act of bankruptcy prior to the execution, and till after the then sheriffs had delivered the goods up to the assignees of the bankrupt on the 16th of *March*, and had gone out of office in the *September* following; and then in *January* 1812, issued a writ of distringas to the present sheriffs to distrain the late sheriffs for not selling the goods; the Court set aside the last mentioned writ, leaving the plaintiff to his remedy by action, if the commission were fraudulent, as alleged by him. *Clutterbuck* v. *Jones*, *H.* 52 *G.* 3. 78
2. After the return-day of the scire facias quare executionem non, &c. sued out by the defendants in error, and a rule to appear, and a four-day rule to assign errors, served on the plaintiff in error; though judgment of non-pros were entered up, and execution sued out, before the expiration of the rule to assign errors, yet if error were not assigned in time, the execution stands good. *Wright* v. *Peckham and Another, Executor and Executrix*, *H.* 52 *G.* 3. 204
3. A tenant having committed an act of bankruptcy in *October*, 1810, upon which a commission issued on the 21st of *January* 1811, and the sheriff having, on the 7th of *January*, levied an execution at the suit of the landlord, for a judgment debt of 600*l.*, under which he sold the goods of the tenant on the 21st and 22d of *January* for 520*l.* and out of that sum when received, paid the landlord 140*l.* for one year's rent in arrear; held in an action for money had and received, brought by the assignees of the bankrupt tenant against the sheriff, to recover the whole amount of the sum levied, that the property in the goods being changed by the act of bankruptcy and commission, and transferred to the assignees, it lay upon the sheriff to prove that he had paid over the money to the landlord and execution creditor before he had notice of the commission issued; and not giving such proof, that he was liable for the amount to the assignees; and that he was not entitled to deduct the 140*l.* paid over to the landlord, as for the year's rent in arrear, under the statute 8 *Ann. c.* 14. *s.* 1. a commission of bankrupt not being an *execution* within the meaning of that statute, which directs that no goods upon demised premises shall be taken by virtue of any *execution*, unless the execution creditor shall, *before the removal of such goods from off the premises*, pay to the landlord all arrears of rent not exceeding a year's rent. *Lee and Another, Assignees of Hill, a Bank-*

rupt, v. *Lopes*, *Bart. H.* 52 *G.* 3. 230

4. A tradesman supplying a married woman, living apart from her husband, with furniture upon hire, does not thereby divest himself of the present right of property in such goods, inasmuch as the married woman was incapable of acquiring it by any contract; and therefore if the sheriff take such goods in execution at the suit of the husband's creditor, trover lies by the tradesman. But if the contract had been valid, the goods being let to hire generally, without any time limited, notice to determine the contract given to the sheriff's officer, and not to the other contracting party, would not be sufficient to determine the contract. *Smith* v. *The Sheriffs of Middlesex*, *E.* 52 *G.* 3. 607

FORFEITURE,

See LANDLORD AND TENANT, 2.

FORGERY.

See AGREEMENT 1.

FRAUDS, STATUTE OF.

1. A memorandum in writing of a contract for the purchase of flour by the defendant of the plaintiff, a miller, taken by the plaintiff's rider in his common order-book in these terms: "19th *February*, 1811, of *John Smith*, 64*l.* (which was explained by the witness to mean so much received of the defendant in satisfaction of a former order), "do. 40 of 3—58*l.*" (which was explained by the witness to mean a new order for 40 sacks of flour, called *thirds*, at 58*s.* a sack), and this without any signature, is not a sufficient memorandum in writing of the bargain within the statute of frauds, 29 *Car.* 2. *c.* 3. *s.* 17. to bind the defendant, though it was read over to him by his desire at the time it was written. And such defective memorandum cannot be supplied by a letter written afterwards by the defendant, in which, though he recognized the order, yet he insisted that the flour had not been delivered in time, and therefore he was not bound to take it. And it was not competent for the plaintiff to prove, by the parol testimony of the person who took the order, that there was no such term in the contract as to deliver the flour within a given time. *Cooper* v. *Smith*, *H.* 52. *G.* 3. 103

2. A letter addressed by the defendant to Mr. *G.* who was the plaintiff's attorney, stating that "the bearer, *D. Williams*, has a sum of money to receive from a client of mine some day next week, and I trust you will give him indulgence till that day, when I undertake to see you paid," and signed by the defendant; is evidence within the fourth clause of the statute of frauds, to charge him with the debt due from *Williams* to the plaintiff, upon parol-proof of its amount, and that Mr. *G.*, to whom it was addressed, was the attorney of the plaintiff, and received the letter in that character from *Williams* the bearer, and not as the principal and creditor. *Bateman* v. *Phillips*, *E.* 52 *G.* 3. 272

FREIGHT.

1. Freight may be insured for part of a voyage, without notice to the underwriters of the ultimate destination. *Taylor* v. *Wilson*, *E.* 52 *G.* 3. 324

2. Where the freighter of a ship covenanted, that if she should not be fully laden, he would not only pay for the goods on board, but also for so much in addition as the ship would have carried, for which

he had before stipulated to pay freight, according to different rates for three descriptions of goods; held that the ship-owner had no lien upon the goods actually on board for the amount of the *dead freight*, in other words, for the compensation in damages which he was entitled to for the freighter's breach of contract in not putting a full loading on board, which damages were unliquidated; and there being no lien in such a case, either by the usage of trade or the express contract of the parties. *Phillips and Others, Assignees of White, a Bankrupt*, v. *Rodie and Others, E. 52 G. 3.* 547

GAME.

See CONVICTION, 6.

1. The mere fact of keeping a sporting dog is no evidence of a keeping it for the purpose of destroying the game, without some evidence of its being used for that purpose. *Read* v. *Phelps, E. 52 G. 3.* 271
2. A groom attending his qualified master while using dogs for killing the game, and pursuing it by his master's command, is not liable to the penalty of the stat. *5 Ann. c. 14. The King* v. *Taylor, E. 52 G. 3.* 460
3. But it does not appear that unqualified persons can be protected by joining qualified persons without invitation, and taking an active part in killing the game. *Ruled by Lawrence, J. at Stafford Spring Assizes*, 1804, *cited ib.* 462

HEARSAY EVIDENCE.

See EVIDENCE, 5. 6.

HORSE DUTY.

A person letting a horse to hire, to go a certain stage and back again within the day, is required to take out a licence by schedule A. of stat. 44 *G. 3. c. 98.*, requiring a licence to be taken out by every person, " who shall let to hire any horse *for the purpose of travelling post by the mile or from stage to stage*," &c. the same act imposing the duty by schedule B. on every horse *hired by the mile or stage*, to be used in *travelling*, (omitting the word *post*, which seems therefore to have been accidentally retained, without any definite meaning in schedule A.) such act having been passed to repeal a prior statute, in which the word *post* was introduced on both occasions. *Henley qui tam, &c.* v. *Cubberley, E. 52 G. 3.* 257

HUSBAND AND WIFE.

A tradesman supplying a married woman, living apart from her husband, with furniture upon hire, does not thereby divest himself of the present right of property in such goods, inasmuch as the married woman was incapable of acquiring it by any contract; and, therefore, if the sheriff take such goods in execution at the suit of the husband's creditor, trover lies by the tradesman. But if the contract had been valid, the goods being let to hire generally, without any time limited, notice to determine the contract given to the sheriff's officer, and not to the other contracting party, would not be sufficient to determine the contract. *Smith* v. *Plomer, Knight, and Another, Sheriffs of Middlesex, E. 52 G. 3.* 607

INSURANCE.

1. A declaration stating that the plaintiffs (*M.* and another) caused to be effected a policy, containing tha *J. G.* and Co. did make assurance

and averred the interest in *F. W. S.* with a promise by the defendant to the plaintiffs, in consideration of the premium paid by them; was held good, after verdict; for it must be intended that the plaintiffs insured under the names of *J. G.*, and Co. and that they were proved to be within one or other of the descriptions of persons in the stat. 28 *G.* 3. *c.* 56. in whose names, or usual style or firm of dealing, insurance may be made. *Mellish and another* v. *Bell*, *H.* 52 *G.* 3. 4

2. The assured of goods having received intelligence on the 8th of *January*, 1811, that the ship's papers were taken away on the 7th of *December* preceding by the *Swedish* government, within whose port she was, did not give notice of abandonment to the defendant underwriter, till the 17th of *January:* but though such notice was too late, supposing an abandonment to be necessary; yet as the goods were finally seized and unladen by orders of that government on the 30th of *April* following; it was held that the ineffectual notice of abandonment before given did not preclude the assured from recovering as for a total loss, without any abandonment. *Mellish* v. *Andrews*, *H.* 52 *G.* 3. 13

3. It is no objection to the assured on goods recovering for a loss by a peril within the policy, that after the captain had obtained his manifest and custom-house clearances, as required by stat. 13 & 14 *Car.* 2. *c.* 11. *s.* 3., goods of the assured were put on board by the packer, who had previously made all the necessary entries at the custom-house. *Carruthers* v. *Gray*, *H.* 52 *G.* 3. 35

4. Where immediately upon the arrival of a ship at *Riga*, her papers were taken and her hatches sealed down by the officers of government, and so kept till her papers were sent to *St. Petersburgh* to be examined; and on such examination immediate orders were issued for the seizure of the ship and cargo, which were afterwards condemned for carrying simulated papers; held that this was not a mooring twenty-four hours *in safety* after her arrival, within those words in the policy. But that as the ship had no leave to carry simulated papers, although without such she would certainly have been seized and condemned, as coming from an enemy's country; the underwriters were not liable for the loss which ensued from the act of the assured himself. *Horneyer* v. *Lushington*, *H.* 52 *G.* 3. 46

5. A policy of insurance on goods "at and from *Gottenburgh* to *Riga*, beginning the adventure on the goods *from the loading thereof aboard the ship at* Gottenburgh," will not cover goods previously loaded on board at *London*, which arrived in the ship at *Gottenburgh*. *ib.*

6. Though it should be doubtful whether the stat. 48 *G.* 3. *c.* 37. empowering his majesty, by order in council, to permit during the war, &c. the importation of such goods as shall be *specified* therein from any place in which the *British* flag is excluded in any foreign vessel, authorizes an order in council, licensing a *British* merchant, in *general terms*, to import a cargo "*of such goods as are permitted by law to be imported*, (*except* German *linens*, *stock-fish and oil;*") yet an importation into *Great Britain* from a port of *Russia*, under such a licence, of such lawful goods in a neutral *Hamburgh* ship was held to be authorized by the stat. 49 *G.* 3. *c.* 60., which makes it lawful under any order of council already issued or to be issued to import from any part of *Europe* or *Africa*, in any *British* or other ship of an alien friend, in any manner navigated, *any goods which may be lawfully imported*, the growth or produce of any country, on payment of duties, &c.; and therefore an insurance on such

goods for the voyage is legal. *Schroeder* v. *Vaux*, *H.* 52 *G.* 3. 52

7. And such insurance is valid notwithstanding the licence was limited to be in force until the 29th of *September*, and the ship did not sail from the foreign port till the 4th of *October*; it appearing that the goods were loaded on board by the 12th of *September*, and the adventure was then bonâ fide prosecuting under the licence, and the policy attaching *at* and from her loading port. *ib.*

8. An assured upon a policy on ship, not having leave to carry simulated papers, cannot recover for a loss by capture, if it appear by the sentence of the foreign prize court that one of the causes stated for the condemnation was the carrying of simulated papers. *Oswell* v. *Vigne*, *H.* 52 *G.* 3. 70

9. The king having, by orders in council, declared certain ports in *St. Domingo not hostile*, which had formerly been, but were no longer in the possession nor under the dominion of *France*; though such declarations were made for collateral and limited purposes, not covering in their terms the trading in question; yet a trading to such ports from parts of the king's dominions, not named in such prior limited orders, was held to be legalized, the same as to neutral ports in general, by such authoritative recognition of those ports in *St. Domingo* not being *hostile*; and the inference as to the legality of such neutral trade is not rebutted by a subsequent order of council opening the trade generally (so as to cover in its terms the particular adventure) to all ports of *St. Domingo* not in the possession of *France*. And such trade to neutral ports, requiring no licence from the crown, is not restricted by the fact of a *British* ship carrying a licence for trading to those ports from *Great Britain* with a certain specified cargo; but the *British* trader may, notwithstanding, carry other lawful goods, and insure his whole adventure, and may recover from the underwriter a loss arising from capture by a *British* cruizer, though induced by the fact of such trading with goods not covered by the licence which was produced to the captor: for the licence itself not being necessary, the carrying of goods not included in it was no legal cause of seizure, however it might operate upon the question of costs in the prize court. *Blackburne* v. *Thompson*, *H.* 52 *G.* 3. 81

10. The *British* agent effecting a policy of insurance on behalf of alien enemies, who became enemies after the loss happened, but before the action commenced, is entitled to recover against the underwriter, who had only pleaded the general issue: for such temporary suspension during the war of the assured's right of suit upon a contract, legal at the time, and liable to be enforced upon the return of peace, cannot be taken advantage of under a plea of a perpetual bar: there being no legal disability in the plaintiff on the record to sue. *Flindt* v. *Waters*, *E.* 52 *G.* 3. 260

11. A warranty in a policy of insurance, freeing the underwriter from loss by *confiscation of the government* in the ship's port of discharge, does not apply to a case where, upon the arrival of the ship in the roads of *Pillau* within the *Prussian* dominions, she was boarded by two different parties, one of *Prussian* soldiers, and the other the crew of a *French* privateer, who disputed the possession of her, but agreed to take her into *Pillau*, in order to settle their claims; upon which the *Prussian* government referred the matter to the *French* government at *Paris*, where the ship was condemned as prize to the *French* captors, and afterwards

given up to them. For the terms of the warranty import something more to be done on behalf of the local government at the port of discharge than the mere act of seizure by or with the permission of such local government. *Levi* v. *Allnutt, E.* 52 *G.* 3. 267

12. Under a policy of insurance of goods at and from *London* to any port or ports, place or places, in the *Baltic*, backwards and forwards; with leave to touch and stay *at* any ports and places, *for all purposes whatsoever;* the assured may wait *at* any port *for information* as to what port in the *Baltic* the ship might safely proceed to discharge her cargo; that being one of the objects of the adventure arising out of the troubled and shifting state of the different governments on the *Baltic* shores from the pressure of the *French* arms: and this liberty, it seems, is not abridged by a subsequent special leave given *to wait for information, &c. off* any ports and places. *Rucker* v. *Allnutt, E.* 52 *G.* 3. 278

13. Though a policy of insurance on goods contain a clause of warranty, freeing the underwriter from seizure in the ship's port of discharge, yet the assured having declared generally as for a loss by hostile seizure, without negativing that it was in the ship's port of discharge, is no cause for arresting the judgment after verdict. *Rucker* v. *Green, E.* 52 *G.* 3. 288

14. Under a policy of insurance on goods from *London* to any ports or places in the *Baltic*, backwards and forwards, &c.; with leave to touch, stay, and trade *at* all places for all purposes, and to take in and discharge goods wheresoever the ship might touch at; and in case it should be found dangerous to enter such ports and places, or the captain was not allowed to discharge the cargo, with leave to return, &c. until he found a port which he could enter with safety: the insurance to continue until the ship and goods *arrived* at as above: upon the ship until moored at anchor 24 hours in safety, *and upon the goods until the same should be there discharged and safely landed:* at a premium of 14 guineas, *to return* 7*l.* per cent. *for arrival:* with warranty for the goods *free from capture or seizure in the ship's port or ports of discharge.* Held, 1st, that the ship having arrived in the outer road of *Pillau*, which is a bar harbour, where large ships like this are obliged to discharge part of their cargoes into lighters to enable them to go over the bar into the inner harbour, where they discharge the remainder; and the captain having anchored two miles and a quarter further out than ships usually lie for this purpose; (but which difference was negatived by the verdict of the jury as material to the object of inquiry;) and having gone on shore to report his ship and cargo, and obtain permission to discharge his cargo, and to give directions for it; and having returned in five or six days, when he was accompanied by *Prussian* soldiers and a pilot, who took possession of the ship and cargo, and discharged part of it into a lighter in the place where the ship remained at anchor, and afterwards carried her over the bar into the inner harbour, where the goods were finally confiscated: this was an *arrival* in the captain's elected *port* of discharge, so as to discharge the underwriters from the loss by seizure there, within the meaning of the policy. *Dalgleish* v. *Brooke, E.* 52 *G.* 3. 295

15. 2dly. That the assured were entitled to a return of 7*l.* per cent. premium "*for arrival,*" under circumstances which discharged the underwriters from any loss. *ib.*

6. Freight may be insured from *St. Ubes* to *Portsmouth*, upon a ship which sailed with a cargo from *St. Ubes* for *Gottenburgh*, with intent to proceed first to *Portsmouth*, to take up convoy in her way to *Gottenburgh*; and this, without notice to the underwriters that the ultimate destination of the ship and cargo was *Gottenburgh*. *Taylor* v. *Wilson*, *E.* 52 *G.* 3. 324

17. *American* goods in an *American* ship, having been insured on a voyage from *America* to the *Baltic*, with liberty to carry simulated papers, and having been captured and condemned by a *Danish* sentence; which, after suggesting a doubt as to the *English character* of the owner, stated that the positive *contradiction* which the *documents* contained concerning the property of the ship and cargo rendered it impossible to acknowledge them as neutral; and the prize court of appeal afterwards alleging as grounds of confirmation, 1st, That the ship's documents were not in due order; the *sea passport*, ordering that, before it could be considered of value, the captain must take his oath before the officer appointed for that purpose; but that though the passport was made out as if the captain had appeared before *A. B.*, the notary public, and taken his oath, yet that neither the notary's name or seal of office was under the document; and therefore that the sea-letter was to be looked upon as a blank, and no credit could be given to it as a public document: 2dly, that the ship had *false documents*, (which it exemplified by the journal:) 3dly, that the documents disagreed with regard to their contents; which it exemplified by the bills of lading and letters on board: 4thly, that a person on board, who seemed to be interested in the ship and cargo, had been set on shore in *England*: 5thly, that false *French* certificates d'origine were found on board. Held that, taking the whole together, *the ground of condemnation* was the having on board *simulated papers*, which, mixed with other circumstances, led to the conclusion that the ship and cargo were hostile *British*, and not neutral *American* property; and that the not having a *sea passport* on board, verified in the manner stated in the sentence, was only a circumstance to show that the ship carried simulated papers: even if such a passport were required by any treaty between the *United States* and *Denmark*; which did not appear: and consequently, that the loss was attributable to a cause which the underwriter had sanctioned by the leave to carry simulated papers; and not from the ship's not being properly documented, as an *American* ship ought to be, for which the assured, as owner of the ship, as well as of the goods insured, would have been answerable.

Neither was the condemnation, on the ground that the papers had not been properly simulated, so as to attribute the loss to the mere negligence of the assured in the mode of exercising the liberty referred to them; supposing that would have varied the case. *Bell* v. *Bromfield*, *E.* 52 *G.* 3. 364

18. A licence granted by the secretary of state under an order in council by virtue of the stat. 48 *G.* 3. *c.* 126. to *P.*, *B.* and *C.* (who were in fact *British* merchants residing here, but were not so expressed to be in the licence) on behalf of *themselves* AND OTHERS, to export goods on board a certain vessel bearing any flag except the *French*, from *London* to *any* port in the *Baltic*, (of which most were at that time hostile, but some were neutral,) will not warrant an export of goods which were the property at the time of the shipment of an alien enemy, a *Russian* subject residing at *Peters-*

burgh, then a hostile port of the *Baltic*, to which place the cargo was consigned, and at whose desire the license was obtained by *P.*, *B.* and *C.*; and therefore a policy effected on such ship from *London* to *Petersburgh*, in the names of *British* agents here, who averred the interest to be in the *Russian* alien enemy, was held bad; and that such policy was also unavailable to cover a loss occasioned by the seizure and condemnation of the assured's own government, after the arrival of the ship and cargo at *Petersburgh*. *Mennett* v. *Bonham*, *E.* 52 *G.* 3. 477

19. An Admiralty licence obtained under the convoy act 43*G.*3. *c.* 57. for a ship to sail without convoy, describing her as bound on a voyage to *Gibraltar*, when in fact she sailed from hence with instructions to make the best of her way direct to *Palermo*, without touching at *Gibraltar*, unless ordered into the bay by any cruizers which she might meet in passing by it, is fraudulent and void, and will not legalize an insurance by the charterer of such ship sailing without convoy upon goods put on board and insured from hence to *Palermo*, &c. with liberty to proceed to any ports to seek convoy, &c. and therefore will not cover a loss which happened in the latter part of the voyage; though the ship did in fact go into *Gibraltar*, being compelled to it by stress of weather against the master's intentions; and though no convoy was to be procured there, nor licence to proceed without it. *Ingham* v. *Agnew*, *E.* 52 *G.* 3. 517

20. From a licence to *A. B.* (who were in fact *British* merchants residing here) to export goods in a certain ship to any port in the *Baltic not blockaded*, and *to whomsoever the property might appear to belong*, the majority of the Court did not sufficiently collect the intention of the crown to cover the property of *enemies'* ships from hence to an enemy's port; some ports in the *Baltic* being neutral at the time, though most of them were hostile. *Flindt* v. *Crockatt*, *E.* 52 *G.* 3. 522

21. Whether or not a licence under the stat. 48 *G.* 3. *c.* 126. to *C.*, *F.* and Co. of *London*, merchants, on behalf of themselves *and others*, to export on board a certain vessel bearing any flag except the *French*, a cargo of *British* manufacturers and colonial produce from *London* to *Archangel*, and to import from thence a cargo on board the said ship of such goods as may lawfully be imported, would warrant an exportation of the goods licensed by a *Russian purchaser here*, *Russia* being then *hostile*; at all events if such *Russian* owner and alien enemy insure the goods on the voyage from *London* to *Archangel*, and they be seized and condemned by his own government upon their arrival, he cannot recover, by the opinion of a majority of the Court. *Flindt* v. *Scott*, *E.* 52 *G.* 3. 525

22. Upon a policy of insurance on *flax*, valued at so much, and warranted *free of a particular average*, if the vessel be wrecked, and the assured do not abandon, but labours to save the cargo, and in fact saves a part (1-16th), though much damaged, they are entitled to recover as for a total loss of that part which was in fact totally lost, but not for the rest which was saved to them in specie, though deteriorated. *Davy* v. *Milford*, *E.* 52 *G.* 3. 559

23. By the statutes 35 *G.* 3. *c.* 63. *s.* 14. and 48 *G.* 3. *c.* 149. if several distinct interests be insured in the same policy though as for one entire sum, on goods "to be thereafter declared and valued;" and it appear in fact that the several interests included fractional parts of 100*l.* which interests were afterwards declared and indorsed on the

policy, such policy cannot be given in evidence, nor is available in law to any extent, unless stamped with a stamp of sufficient value to cover all such fractional parts, though it were sufficient to cover the entire sum insured. *Rapp* v. *Allnut, E.* 52 *G.* 3. 601

INSTRUMENT,

See AGREEMENT, 1.

INTEREST.

Interest is not allowable by law upon money lent generally, without a contract for it expressed, or to be implied from the usage of trade, or from special circumstances, or from written securities for the payment of principal money at a given time. *Calton* v. *Bragg, H.* 52 *G.* 3. 223

JURISDICTION,

See OXFORD UNIVERSITY. SOUTHWARK COURT.

LANDLORD AND TENANT,

See LEASE. SETTLEMENT BY A TENEMENT OF 10*l.* A YEAR.

1. A tenant having committed an act of bankruptcy in *October* 1810, upon a commission issued on the 21st of *January* 1811, and the sheriff having, on the 7th of *January*, levied an execution at the suit of the landlord for a judgment debt of 600*l.*, under which he sold the goods of the tenant on the 21st and 22d of *January*, for 520*l.*, and out of that sum, when received, paid the landlord 140*l.* for one year's rent in arrear: held, in an action for money had and received, brought by the assignees of the bankrupt tenant against the sheriff, to recover the whole amount of the sum levied, that the property in the goods being changed by the act of bankruptcy and commission, and transferred to the assignees, it lay upon the sheriff to prove that he had paid over the money to the landlord and execution creditor before he had notice of the commission isued; and not giving such proof, that he was liable for the amount to the assignees: and that he was not entitled to deduct the 140*l.* paid over to the landlord, as for the year's rent in arrear, under the stat. 8 *Ann. c.* 14. *s.* 1. a commission of bankrupt not being an *execution* within the meaning of that statute, which directs that no goods upon demised premises shall be taken by virtue of any *execution*, unless the execution creditor shall, *before the removal of such goods from off the premises*, pay to the landlord all arrears of rent not exceeding a year's rent. *Lee and Another, Assignees of Hill, a bankrupt*, v. *Lopes, Bart. H.* 52 *G.* 3. 230

2. Under the proviso in a lease for the entry of the landlord, in case the rent should be in arrear for 14 days, and no sufficient distress found upon the premises, he is entitled to recover in ejectment, on proof of half a year's rent due at *Lady-day*, and no distress on the premises on *some day* in *May*; the demise being laid on the 2d of *May*, and the declaration served on the 6th of *June*; the defendant giving no evidence to rebut the inference, that there was no sufficient distress on the premises within the terms of the proviso; as by showing that there was a sufficient distress on the premises in *May*, up to the day of the demise inclusive, or on the 6th of *June*, when the declaration was served, if that were material with reference to the stat. 4 *G.* 2. *c.* 28. On such proof by the plaintiff the stat. 4 *G.* 2. *c.* 28. dispenses with proof of a demand of the rent on

the day it became due. *Doe, Lessee of Smelt*, v. *Fuchau, E.* 52 *G.* 3. 286

LEASE,

See EVIDENCE, 2. LANDLORD AND TENANT.

1. An instrument dated in *March* 1798, whereby the landlord agreed to let, and also, upon demand, to execute to the tenant a lease of a farm; and the tenant agreed to take, and, upon demand, to execute a counterpart of a lease of the said farm from the 5th of *April* 1798; for 15 years, under a certain yearly rent; which said lease was to contain the usual covenants, and an agreement for re-entry in case of non-payment of rent, and also the further covenants, &c.; and this agreement was to bind until the said lease was made and executed, &c., under which agreement the tenant entered on the 5th of *April* 1798; was held to be a present demise, and therefore requiring a lease stamp; the agreement for a future lease with further covenants being for the better security of the parties. *Doe, on the Demise of Walker*, v. *Groves. H.* 52 *G.* 3. 244
2. The assignor in a deed of assignment of a lease, after reciting the original lease granted to another *for the term of ten years*, which by mesne assignments had vested in him, and that the plaintiff had contracted for the absolute purchase of the premises, bargained, sold, assigned, transferred, and set over the same to the plaintiff, *for and during all the rest, &c. of the said term of ten years*, in as ample manner as the assignor might have held the same; subject to the payment of rent and performance of covenants; and then covenanted that it was *a good and subsisting lease, valid in law, in and for the said premises thereby assigned*, and not forfeited, &c. or otherwise determined, *or become void or voidable*: held that the generality of this covenant for title, which was supported by the recital of the bargain for an absolute term of ten years, was not restrained by other covenants which went only to provide for or against the acts of the assignor himself, or of those who claimed under him; such as, 1st, a covenant against incumbrances, except an under-lease of part by the assignor for three years: 2dly, for quiet enjoyment; 3dly, for further assurance: and therefore where it appeared that the original lease was for ten years, determinable on a life in being, which dropped before the ten years expired, though not till after the covenant of the assignor; held that the assignee might assign a breach upon the absolute covenant for title. *Barton* v. *Fitzgerald, E.* 52 *G.* 3. 530

LECTURER,

See MANDAMUS, 1.

LICENCE,

See TRADING LICENCE.

LIEN.

1. A banker has a lien for the amount of his balance upon money securities paid in by a customer on his running account; and the banker's assignees after his bankruptcy, may sue the drawer of one of those securities, made payable to bearer, who defended the action on behalf of the customer, and may recover against such drawer the amount of the balance: and this notwithstanding an offer made to the assignees on the part of the customer before the action brought, that he was not aware of the exact balance, but that

if any were due he was ready to pay it, on receiving back the security; for this was no tender of the balance to defeat this action. *Scott and others, Assignees of J. M. Jukes, J. Langley, and E. Jukes, Bankrupts*, v. *Franklin, E.* 52. *G.* 3. 428

2. Where the freighter of a ship covenanted that if she should not be fully laden, he would not only pay for the goods on board, but also for so much in addition as the ship would have carried, for which he had before stipulated to pay freight according to the different rates for three descriptions of goods: held that the ship owner had no lien upon the goods actually on board for the amount of the *dead freight*, in other words, for the compensation in damages which he was entitled to for the freighter's breach of contract in not putting a full loading on board; which damages were unliquidated; and there being no lien in such a case either by the usages of trade or the express contract of the parties. *Phillips and Others, Assignees of White, a Bankrupt*, v. *Rodie and others, E.* 52 *G.* 3. 547

3. Nor had the ship-owner any lien for demurrage. *ib.*

LIMITATION, STATUTE OF.

A replication to a plea of the statute of limitations shewed a bill of *Middlesex* sued out by the plaintiff on the 8th of *August* 1805, (being in vacation,) within six years after the cause of action accrued; to which the sheriff returned non est inventus; and then stated the alias and a succession of pluries bills down to *Easter* term 1811, to each of which but the last it was averred that the sheriff made no return, and that the defendant did not appear, but that he did appear to the last on the return-day, when the plaintiff offered himself against the defendant in the plea aforesaid, *as by the record and proceedings thereof, remaining in the said court, &c. at large appears*: Held, 1st, that this latter allegation had reference to all and every the prior process stated, and was therefore tantamount to an allegation of the sheriff's return of non est inventus to the first bill of *Middlesex* stated, with a *prout patet*, &c. against which there could be no averment in pleading. 2dly. That the Court will take notice in pleading of the issuing of the bill of *Middlesex* on a day in vacation, though it be not pleaded to have been then issued as of the preceding term. *Harrington* v. *Taylor, E.* 52 *G.* 3. 378

MALT.

See CONVICTION, 2.

MANDAMUS.

The Court discharged a rule for a mandamus to the bishop of *London* to licence a clerk chosen by the inhabitants of *Bartholomew, Exchange, London*, to an endowed lectureship in the parish church there, upon affidavit made by the bishop that the party elected had been admitted before him with a view to his being "*approved and licensed*," (which are the words of the stat. 13 & 14 *Car.* 2. *c.* 4. *s.* 19. imposing that function upon the archbishop or bishop before any lecturer may lawfully preach;) that he had made diligent inquiry concerning his conduct and ministry, and being convinced from such inquiry *that he was not a fit person* to be allowed to lecture, he had conscientiously determined, after having heard him, *that he could not approve nor licence him thereunto*. And the rule which included the archbishop of *Canterbury*, as well as the bishop, in the alternative,

was also discharged as against the former (against whom it was not pressed); though it was considered to be equally open to the party to make a substantive application against the archbishop, if he declined to inquire as to his fitness, with a view to approve or disapprove of him as a fit person to be licensed. *The King* v. *The Archbishop of Canterbury and the Bishop of London, H.* 52 *G.* 3. 117

MILLER.

See APPRENTICE, 1.

MISNOMER.

The defendant after giving a bail-bond to the sheriff on his arrest, and being afterwards served with notice of declaration, if he do not plead in abatement for a misnomer within the 4 first days, the Court will not afterwards (though before pleading in chief) set aside the proceedings upon motion, on the ground that he had been arrested and declared against by a wrong christian name. *Binfield* v. *Maxwell, H.* 52 *G.* 3. 159

NUISANCE.

1. There is no objection upon the stat. 6 *G.* 1. c. 18. *s.* 18, 19. as for a public nuisance and grievance, to articles of agreement, whereby 50 persons agreed to raise 200 shares at 210*l.* each, *by small monthly subscriptions*, for building houses for each other, every holder paying interest on his shares till paid up: with a stipulation for the members *to employ certain tradesmen only* in the building; with power to each member *to sell his shares and transfer them* in the books of the society; *provided* that *the purchasers shall be approved* at a meeting of the society, *and* should, on his admission, *become a party to the original articles:* for there is nothing illegal per se in the general object or in the mode of executing it; nor is such a limited power of transferring the shares a raising of transferable stock within the mischief of the act. *Pratt* v. *Hutchinson, E.* 52 *G.* 3. 511
2. The justices of *Dorset* having under the stat. 43 *G.* 3. c. 59. contracted for the building of a new bridge in a different site, in lieu of the old one, which was ruinous; and having directed the old bridge to be taken down before the new one was passable, for the benefit of the old materials to be used by the contractor in finishing the new bridge; this Court refused a writ of prohibition to them, to restrain them from pulling down the old before the new bridge was passable; though there were strong affidavits of the inconvenience and loss to be sustained by the neighbourhood in being obliged to use a round-about way in the interval: referring the complainants to the ordinary remedy by indictment, if the pulling down the old bridge, under these circumstances, were a nuisance; and seeing no occasion to interfere by applying a prompt remedy of a novel kind in modern practice. *The King* v. *the Justices of Dorset, and Others, E.* 52 *G.*3. 594

OFFICER.

The captain of a sloop of war is not answerable for damage done by her running down another vessel; the mischief appearing to have been done during the watch of the lieutenant, who was upon deck, and had the actual direction and management of the steering and navigating of the sloop at the time, and when the captain was not upon deck, nor was called by his duty to be there. *Nicholson* v. *Mounsey and Syms, E.* 52 *G.* 3. 384

ORDERS IN COUNCIL,

See TRADE, &c., 3.

OUTLAWRY.

See PLEADING, 1.

OVERSEERS' ACCOUNTS.

Where overseers' accounts were not allowed till the last day when an effectual notice of appeal to the then next sessions could have been given, and it did not appear when the party objecting had notice of such allowance; held that neither under the stat. 43 *Eliz. c.* 2. *s.* 6. nor under the stat. 17 *G.* 2. *c.* 38. *s.* 4. (supposing the latter to be a repeal of the other as to giving an appeal to the *next* sessions after the verification and allowance of such accounts, instead of giving the appeal *generally* as the stat. of *Elizabeth* does,) was the appeal too late to the next subsequent sessions, for which an effectual notice of appeal could be given; particularly where there seemed to be management to defeat the appeal. *The King* v. *The Justices of Dorsetshire, H.* 52 *G.* 3. 200

OXFORD UNIVERSITY.

Claim of conuzance by the university of *Oxford* was allowed in an action of trespass against a proctor, a proproctor and the marshal of the university; though the affidavit of the latter, describing him as of a parish in the suburbs of *Oxford*, only verified that he then was and had been for the last 14 years a common servant of the university, called marshal of the university, and that he was sued for an act done by him in the discharge of his duty, and in obedience to the orders of the other two defendants; without stating that he resided within the university, or was matriculated. *Thornton* v. *Ford and Serle, Clerks, and Holliday, E.* 52 *G.* 3. 634

PARDON,

See ATTAINDER.

PARTNERS.

Where one of two partners drew bills of exchange in his own name, which he procured to be discounted with a banker through the medium of the same agent, who procured the discount of other bills drawn in the partnership firm with the same banker; the latter has no remedy against *the partnership*, either upon the bills so drawn by a single partner, or for money had and received through the medium of such bills; though the proceeds were carried to the partnership account; the money being advanced solely on the security of the parties whose names were on the bill, *by way of discount*, and not by way of *loan* to the partnership; though the banker conceived at the time that all the bills were drawn on the partnership account. *Emly and Others, Assignees of Burrough, a Bankrupt*, v. *Lye, H.* 52 *G.* 3. 7.

PEDIGREE,

See EVIDENCE, 5, 6.

PLEADING.

1. If in a joint action against two it appear that one of the defendants has been outlawed upon different process from that by which the other was brought into Court, and no connection be shewn between the several writs of capias issued against each as referable to the same original; as where the one was outlawed upon process by original, tested

the 10th of *April*, returnable on the first return of *Easter* term, and continued regularly down to the time of the outlawry; and the other was arrested upon a special testatum capias issued on the 24th of *April* in *Hilary* vacation, and tested in the preceding *Hilary* term; to which bail was put in; and the plaintiff declared against him alone; alleging the outlawry of the other defendant *in the same suit;* the Court will set aside the declaration for irregularity. *Haigh and Others* v. *Conway and Davidson*, *H.* 52 *G.* 3. 1

2. A declaration stating that the plaintiffs (*M.* and another) caused to be effected a policy, containing that *J. G.* and Co. did make assurance, and averring the interest in *F. W. S.*, with a promise by the defendant to the plaintiff, in consideration of the premium paid by them, was held good, after verdict; for it must be intended that the plaintiffs insured under the names of *J. G.* and Co., and that they were proved to be within one or other of the descriptions of persons in the stat. 28 *G.* 3. *c.* 56., in whose names, or usual style or firm of dealing, insurance may be made. *Mellish and another* v. *Bell*, *H.* 52 *G.* 3. 4

3 In trespass quare clausum fregit, if the defendant plead the general issue, and also a special justification that the locus in quo was part of a certain common field, which was then allotted to him by the leet jury of the manor: and the plaintiff reply and new assign to the special plea, after setting out the abuttals of the closes trespassed upon, that the closes newly assigned are different from the defendant's allotment: if in fact they be the same, the defendant is entitled to a verdict on the issue upon the new assignment. *Pratt* v. *Groome*, *H.* 52 *Geo.* 3. 235

4. The *British* agent effecting a policy of insurance on behalf of alien enemies, who became such after the loss happened, but before the action commenced, is entitled to recover against the underwriter, who had only pleaded the general issue: for such temporary suspension during the war of the assured's right of suit upon a contract legal at the time, and liable to be enforced upon the return of peace, cannot be taken advantage of under a plea of a perpetual bar; there being no legal disability in the plaintiff on the record to sue. *Flindt* v. *Waters*, *E.* 52 *G.* 3. 260

5. Though a policy of insurance on goods contain a clause of warranty freeing the underwriter from seizure in the ship's port of discharge; yet the assured having declared generally as for a loss by hostile seizure, without negativing that it was in the ship's port of discharge, is no cause for arresting the judgment after verdict. *Rucker* v. *Green*, *E.* 52 *G.* 3. 288

6. A replication to a plea of the statute of limitations shewed a bill of *Middlesex* sued out by the plaintiff on the 8th of *August* 1805, (being in the vacation) within six years after the cause of action accrued; to which the sheriff returned non est inventus; and then stated the alias and a succession of pluries bills down to *Easter* term 1811; to each of which but the last it was averred that the sheriff made no return, and that the defendant did not appear; but that he did appear to the last on the return day, when the plaintiff offered himself against the defendant in the plea aforesaid, *as by the record and proceedings thereof, remaining in the said court &c. at large appears.* Held, 1st, that this latter allegation had reference to all and every the prior process stated, and was therefore tantamount to an allegation of the sheriff's return of non est inventus to the first bill of *Middlesex* stated, with a *prout patet*, &c.; against

which there could be no averment in pleading. 2dly, That the Court will take notice in pleading of the issuing of the bill of *Middlesex* on a day in vacation, though it be not pleaded to have been then issued *as of the preceding term*. *Harrington* v. *Taylor*, *E.* 52 *G.* 3. 378

7. To a plea of justification in trespass under a capias ad satisfaciendum issued at the suit of the now defendant against the now plaintiff, by virtue of which the latter was arrested and detained till payment of 1267*l.*; if the plaintiff reply that the writ was irregularly issued for so much; whereas *it ought only to have been for* 300*l.*; and that the Court afterwards on motion ordered it *to be quashed*; which fact was found for the plaintiff; the Court will intend, on the plaintiff's own shewing, that the writ was only *quashed for the excess*, and will arrest the judgment. *King* v. *Harrison*, *E.* 52 *G.* 3. 612

POOR'S-RATE,

See WITNESS, 1.

1. The party objecting to a poor's-rate may appeal to the next sessions for which he is in time to give an effectual notice of appeal after the publication of the rate; and one intervening day between such publication and the next immediate quarter sessions is not sufficient time for the purpose. *The King* v. *The Justices of Sussex*, *H.* 52 *G.* 3. 206
2. Several parties having a joint grievance, such as the omission of persons in the rate who ought to be rated, may join in giving one notice of appeal to the parish officers. *ib.*
3. An appeal against a poor's-rate in *London* or *Middlesex* must be made, as in all other counties, to the next (i. e. next practicable) general *quarter* sessions; though the stat. 18 *G.* 2. *c.* 38. *s.* 4. in its terms gives the appeal to the next *general* or *quarter* sessions; it appearing from other parts of the act, as well as from other acts in pari materiâ, that those terms are used synonymously; and though in the two counties named there are four *general* as well as four *general quarter* sessions. *The King* v. *The Justices of London*, *E.* 52 *G.* 3. 632

PRACTICE,

See AWARD, 1. COSTS.

1. If in a joint action against two it appear that one of the defendants has been outlawed upon different process from that by which the other was brought into Court, and no connection be shewn between the several writs of capias issued against each as referable to the same original; as where the one was outlawed upon process by original tested the 10th of *April*, returnable on the first return of *Easter* term, and continued regularly down to the time of the outlawry; and the other was arrested upon a special testatum capias issued on the 24th of *April* in *Hilary* vacation, and tested in the preceding *Hilary* term; to which bail was put in, and the plaintiff declared against him alone, alleging the outlawry of the other defendant *in the same suit*; the Court will set aside the declaration for irregularity. *Haigh and Others* v. *Conway and Davidson*, *H.* 52 *G.* 3. 1
2. The Court, on application by the bail of the defendant, who was in custody on a charge of obtaining money upon false pretences, will grant a writ of habeas corpus to the gaoler to bring him up in order that he may be rendered in discharge of his bail. *Daniel* v. *Thompson*, *H.* 52 *G.* 3. 78

3. Where the late sheriffs of *London*, having taken the defendant's goods in execution under a writ of fi. fa. were ruled, on the 8th of *February* 1811, to return the writ; and returned on the 11th that they had the goods in hand for want of buyers; after which the plaintiff, without issuing a writ of venditioni exponas, lay by till after a commission of bankrupt against the defendant, founded on an act of bankruptcy prior to the execution, and till after the then sheriffs had delivered the goods up to the assignees of the bankrupt on the 16th of *March*, and had gone out of office in the *September* following; and then, in *January* 1812, issued a writ of distringas to the present sheriffs to distrain the late sheriffs for not selling the goods; the Court set aside the last mentioned writ; leaving the plaintiff to his remedy by action, if the commission were fraudulent, as alleged by him. *Clutterbuck* v. *Jones*, *H.* 52 *G.* 3. *ib.*

4. The defendant, having given a bail-bond to the sheriff on his arrest, and being afterwards served with notice of declaration; if he do not plead in abatement for a misnomer within the four first days, the Court will not afterwards (though before pleading in chief) set aside the proceedings upon motion, on the ground that he had been arrested and declared against by a wrong christian name. *Binfield* v. *Maxwell*, *H.* 52 *G.* 3. 159

5. After the return-day of the scire facias quare executionem non, &c. sued out by the defendants in error, and a four-day rule to assign errors served on the plaintiff in error, though judgment of non pros were entered up, and execution sued out before the expiration of the rule to assign errors, yet if error were not assigned in time, the execution stands good, *Wright* v. *Peckham and Another, Executor and Executrix*. *H.* 52 *G.* 3. 204

6. The plaintiff may abandon an attachment obtained against the sheriff, and take an assignment of the bail-bond and proceed thereon. *Pople* v. *Wyatt*, *H.* 52 *G.* 3. 215

7. The Court will not suffer questions to be agitated by agreement of the parties in the form of an action for money had and received, in a case where such action does not lie by law. *Marshall* v. *Hopkins*, *H.* 52 *G.* 3. 309

8. The Court will take cognizance of a case reserved by the sessions, accompanying proceedings upon a conviction removed by certiorari. *The King* v. *Allen*, *E.* 52 *G.* 3. 333

9. Where the plaintiff had taken a cognovit from the defendant, with an agreement to receive the debt by long instalments; of which no notice was given to the bail; the Court set aside an execution against the bail sued out above a year after the judgment without a scire facias to revive it; even if the agreement by the plaintiff to take the debt by instalments, without the consent of the bail, would not have discharged them; as they could not after that have rendered their principal. *Thomas* v. *Young and Joggett, bail of Graham*, *E.* 52 *G.* 3. 617

10. After the rule to certify the record in error has run out, the defendant in error may sue out his writ of scire facias quare executionem non, &c. though the transcript was not then actually delivered and filed, as it ought to have been. *Branscombe* v. *Hughes*, *in Error*, *E.* 52 *G.* 3. 646

11. A *joint* warrant of attorney, given to enter judgment upon a *joint and* several bond, will not authorize the entering up judgment against the survivor only. *Gee* v. *Lane*, *E.* 52 *G.* 3. 592

PRINCIPAL AND AGENT, OR BROKER.

1. Quære, whether a broker, who sells goods and receives the money for them on account of his principal, can controvert his title to the goods in an action brought against him by the principal or his assignees for the money? *Jones and Another, Assignees of Mingay and Co. Bankrupts, v. Dwyer, H. 52 G.* 3. 21
2. Where a purchaser of hemp lying at wharfs in *London*, had, at the time of his purchase, the hemp transferred in the wharfinger's books into the name of the broker who effected the purchase for him, and whose ordinary business it was to buy and sell hemp; this was held to give the broker an implied authority to sell it, and that his sale and receipt of the money bound his unknown principal. So if it be transferred into the names of "*P. or S.*" that is, of the principal or broker. *Pickering* v. *Bush and Another, Assignees of Hayward, a Bankrupt, H. 52 G.* 3. 38
3. If the seller of goods knowing at the time that the buyer, though dealt with him in his own name, is in truth the agent of another, elect to give the credit to such agent, he cannot afterwards recover the value against the known principal; but if the principal be not known at the time of the purchase made by the agent, it seems that when discovered, the principal or the agent may be sued at the election of the seller; unless where by the usage of trade, the credit is understood to be confined to the agent so dealing; as particularly in the case of principals residing abroad. *Paterson* v. *Gandasequi, H. 52 G.* 3. 62
4. A factor made purchases for his principal, who made payments to him on account: afterwards the factor was pressed for payment by the sellers in a letter which came to the hands of the principal, who transmitted it to the factor; and with this knowledge of the fact paid him the residue; held that the principal was liable over to the sellers for the residue so paid over to his factor after notice. *Powell* v. *Nelson*, on the Western circuit, cited *ib.* 65
5. The defendant having contracted with a surveyor, who ordered goods from the plaintiff for the use of the the defendant's house; held that the defendant was not liable for them. *Bramah* v. *Lord Abingdon*, cited *ib.* 66
6. Where the defendant bought goods of the plaintiffs in the name and upon the credit of *Smith* and Co. but in reality on his own account, he was held liable. *Railton* v. *Hodgson, London* sittings after *Trinity* term 1804, and *Peele* v. *Hodgson*, at the sittings after *Michaelmas* term 1804, cited *ib.* 67
7. Brokers in the usual habit of buying and paying for, and of selling and receiving the value for sugars, on speculation, in their own names, and upon their own judgment, for their principal; sometimes when the market was low, under an unlimited authority as to quantity and price; at other times under special instructions to buy; but guided from time to time by special instructions to sell, and limited in respect of price, and advised from time to time by their principal as to the probable rise or fall of the market; but keeping only a general account with their principal of the sums advanced to and received for him, without accounting separately for each particular lot purchased and resold; may bind him by a re-sale of a particular parcel of sugars before purchased and paid for in their own names, and lodged in their own warehouse; though sold under the price directed by their principal, for whom they received the money, but afterwards failed. The general authority of the broker to sell, so as

to bind their principal in respect of the purchaser, being to be collected from their general dealing, and not merely from their private instructions as to the particular parcel of goods. *Whitehead* v. *Tuckett*, *E.* 52 *G.* 3. 400

PROCESS.

See TRESPASS, 2.

1. If in a joint action against two, it appear that one of the defendants has been outlawed upon different process from that by which the other was brought into Court, and no connection be shewn between the several writs of capias issued against each, as referable to the same original; as where the one was outlawed upon process by original, tested the 10th of *April*, returnable on the first return of *Easter* term, and continued regularly down to the time of the outlawry; and the other was arrested upon a special testatum capias issued on the 24th of *April* in *Hilary* vacation, and tested in the preceding *Hilary* term; to which bail was put in, and the plaintiff declared against him alone, alleging the outlawry of the other defendant *in the same suit;* the Court will set aside the declaration for irregularity. *Haigh and Others* v. *Conway and Davidson*, *H.* 52 *G.* 3. 1
2. As to pleading process to take the case out of the statute of limitations, *See* Pleading, 6.

The Court will take notice in pleadof the issuing of the bill of *Middlesex* on a day in vacation, though it be not pleaded to have issued as of the preceding term. *Harrington* v. *Taylor*, *E.* 52 *G.* 3. 378

3. To a plea of justification in trespass under a capias ad satisfaciendum issued at the suit of the now defendant against the now plaintiff, by virtue of which the latter was arrested and detained till payment of 1267*l.*; if the plaintiff reply that the writ was irregularly issued for so much, whereas it ought only to have been for 300*l.*, and that the Court afterwards on motion ordered it to be quashed, which fact was found for the plaintiff; the Court intended on the plaintiff's own shewing, that the writ was only quashed for the excess, and arrested the judgment. *King* v. *Harrison*, *one*, *&c.* *E.* 52 *G.* 3. 612

PROHIBITION.

1. Where a plaintiff is put to declare in prohibition, and is nonsuited at the assizes, the defendant is only entitled to single costs under the stat. 8 and 9 *W.* 3. *c.* 11. *s.* 3., and not to double costs under the stat. 2 and 3 *Ed.* 6. *c.* 13. *s.* 14., which latter only applies to cases where the party who is hindered of his suit in the ecclesiastical court by the prohibition, acquiesces in it; and then the party obtaining it must within six calendar months verify his suggestion by the depositions of two witnesses in the court which granted the prohibition; otherwise the party hindered shall have a consultation, and double costs and damages. *Trask* v. *French*, *Clerk*, *E.* 52 *G.* 3. 574
2. The justices of *Dorset* having under the stat. 43 *G.* 3. *c.* 59., contracted for the building of a new bridge in a different site, in lieu of the old one, which was ruinous; and having directed the old bridge to be taken down before the new one was passable, for the benefit of the old materials to be used by the contractor in finishing the new bridge; this Court refused a writ of prohibition to them, to restrain them from pulling down the old before the new bridge was passable; though there were strong affidavits of the inconvenience and loss to be sustained by the neighbourhood in being obliged

to use a round-about way in the interval; referring the complainants to the ordinary remedy by indictment, if the pulling down the old bridge, under these circumstances, were a nuisance; and seeing no occasion to interfere by applying a prompt remedy of a novel kind in modern practice. *The King* v. *The Justices of Dorset and Others*, *E.* 52 *G.* 3. 594

PROPERTY TAX.

A deed granting an annuity within the time included by relation back in the property-tax act 46 *G.* 3. *c.* 65., reciting the agreement for the purchase at a certain price of a certain annuity, *free from the property or income tax*, and covenanting for the payment of it *without any deduction in respect of the property or income tax*, or other parliamentary taxes, &c. is not void in toto, but only to the extent of such disallowance. *Howe* v. *Synge*, *E.* 52 *G.* 3. 440

PURCHASER OF GOODS,

See PRINCIPAL AND AGENT, 3, 4, 5, 6.

QUARTER SESSIONS,

See SESSIONS.

RENT.

See EXECUTION, 3. LANDLORD AND TENANT, 2.

SALE-NOTE,

See AGREEMENT, 1.

SALE OF GOODS,

See PRINCIPAL AND AGENT. AGREEMENT, 2.

SCHOOLMASTER,

See SETTLEMENT BY ESTATE, 1.

SENTENCE OF CONDEMNATION,

See INSURANCE.

SESSIONS.

An appeal against a poor's-rate in *London* or *Middlesex* must be made as in all other counties to the next (i. e. next practicable) general quarter sessions, though the stat. 17 *G.* 2. *c.* 38. *s.* 4. in its terms gives the appeal to the next general *or* quarter sessions; it appearing from other parts of the act, as well as from other acts in pari materiâ, that those terms are used synonymous; and though in the two counties named there are four general as well as four general quarter sessions. *The King* v. *The Justices of London*, *E.* 52 *G.* 3. 632

SETTLEMENT—*by Apprenticeship.*

Since the act of 32 *G.* 3. *c.* 57., for the regulation of parish apprentices: which recites that *on the death of the master during the term of such apprenticeship, the agreement for service on the part of the apprentice is at an end*, but the covenant for maintenance on the part of the master still continues as far as his assets extend, or doubts have arisen with respect thereto, &c.; and then enacts that such covenants for maintenance of parish apprentices, with whom no more than 5*l.* shall be given, shall not continue in force longer than for three calendar months after the death of the master, &c., during which three months the apprentice shall continue to serve the executors,

&c., or their appointee; and that within the three months two justices of the peace, on application of the widow or certain relatives of the master, may, by indorsement on the indenture, &c., direct such apprentice to serve out his time with the applicant; such applicant having lived with and been part of the family of the master, &c., at his death: but otherwise, that such apprenticeship shall be determined: and then it provides (*s.* 5.) *that nothing thereinbefore contained shall extend to any parish apprentice but to such only as shall be living with and make part of the family, or be in the actual employment of the original master, &c., or of any subsequent master, &c. appointed under the provisions of the act at the time of the death of such master, &c.*

Held that a parish apprentice, who was not living at the time of his mistress's death with her *appointee under the provisions of the act*, though living with her son by her individual consent, could not gain a settlement in another parish by serving another mistress *with the consent of the son and assignee* of the original mistress, given *after the death of the original mistress*; the contract of service being declared by the recital of the act to be at an end upon the death of the original mistress, unless continued in the manner described in the 2d, 3d, and 4th sections of the act; to which sections the proviso in the 5th section seems properly to apply. *The King* v. *The Inhabitants of Sheepshead, H.* 52 *G.* 3. 59

SETTLEMENT—*by Certificate.*

See SETTLEMENT—*by Relief.*

SETTLEMENT—*by Estate.*

1. Under a devise of *B.* to trustees in fee of a certain farm, upon trust to dispose of the rents, issues, and profits, as to 40*s.* a-year to the poor of the parish, and the residue to be paid to a schoolmaster, to be nominated by them to teach the poor children to read the bible; the trustees, by an agreement in writing, reciting that they were possessed of and entitled to a school-house, yard, garden, and premises at *M.* which they had agreed to let to *W. S.* for the purposes mentioned, thereby agreed with *W. S.* to let him have the possession, use, and occupation of the school-house, &c. and premises, *for the purpose of teaching the poor children of* M. *to read in the bible, pursuant to the will of* B.: and in consideration of his agreeing to teach the said children, he was reside on the premises rent-free, and to be paid a certain annual sum by the trustees; who reserved to themselves a power, for reasonable cause, to suspend his salary, and that in case of his death they should turn his executors out of the premises, and appoint another schoolmaster thereto. Held that this was an appointment, though irregular in its form, of *W. S.*, under the will, as schoolmaster, so as to give him a life-interest in the school-house, &c. and premises of which he was put in possession, and to enable him to gain a settlement by 40 days' residence thereon; though the trustees fraudulently withheld from him part of the rents, issues, and profits of the trust estate: and that the finding of the the sessions, "that the appointment was fraudulent and in no respect consistent with the will," was to be understood in that sense only, and not as imputing fraud to the schoolmaster himself, who was thus wronged, and who engaged to execute all the duties of his appointment under the will. *The King* v. *The Inhabitants of Owersby-le-Moor, E.* 52 *G.* 3. 356

2. An attainted felon having been dis-

charged by order of the secretary of state, under the sign manual, signifying his majesty's pleasure to grant him an unconditional pardon, and directing his name to be inserted in the next general pardon, (of the issuing of which pardon there was some negative evidence;) and having afterwards purchased a copyhold for more than 30*l*., to which he was admitted upon surrender formally made, and resided on and received the issues and profits of it for nine years, without impeachment of his title; gained a settlement by such residence thereon for 40 days, and communicated such his settlement to an unemancipated child, part of his family. *The King* v. *The Inhabitants of Haddenham*, *E.* 52 *G.* 3. 463

SETTLEMENT—*by Evidence of Relief.*

Evidence of a settlement in *A.* by shewing that the pauper's grandfather came into *B.*, under a certificate from *A.*, is rebutted by shewing that *B.* had relieved the pauper and his family while residing in other places. *The King* v. *The Inhabitants of Stanley-cum-Wrenthorpe*, *E.* 52 *G.* 3. 350

SETTLEMENT—*by Hiring and Service.*

1. An unmarried man agreed on the 17th of *October* 1803, to serve a master for *the year*, at 9*s.* 6*d.* a-week; and received those wages till the 13th of *October* 1804: three or four days before which (having in the mean time married) he agreed with his master to serve him for *another year* at 10*s.* a-week, which sum he received on the 20th of *October*, and served more than a year afterwards: Held that this was evidence upon which the sessions might draw the conclusion that the original hiring was for the space of a year, and not merely for the current year of 1803, and that there was a sufficient service for a year, coupled with such hiring to gain a settlement. *The King* v. *The Inhabitants of Overnorton*, *E.* 52 *G.* 3. 347
2. A poor boy of *A.*, 16 years of age, offered to serve a parishioner of *B.* who asked him if he was willing to bind hay, &c. and do whatever else he was bid; to which the boy said he was willing; and the other took him home to *B.*; but a day or two afterwards told the boy he could not keep him if he could not get better clothes; when the boy said that the overseer of *A.* would find him clothes; and the next day accompanied his master to the overseer of *A.*, who agreed to find clothes, but stipulated with the master, and the latter agreed to pay the overseer 1*s.* a-week for the parish, on account of the clothes found. The overseer at the same time asked the boy, in the master's presence, if he went willingly into the master's service; to which the boy assented. Held that this was a contract of hiring by the boy himself, and not merely by the overseer, under which a settlement might be gained by a year's service. *The King* v. *The Inhabitants of Dunton*, *E.* 52 *G.* 3. 352
3. Where a pauper had served a master under unstamped articles of agreement to work with him for three years, at certain rates of weekly wages, and under certain covenants, after which he had continued to serve his master for four years longer, without coming to any new agreement; though such unstamped writing cannot be received as evidence for the purpose of proving the agreement between the parties, yet the sessions may look at it for the purpose of seeing when it ceased to operate, in order to guide them in receiving parole evidence of

service for the last four years, at wages; from whence the sessions might presume a yearly contract. *The King* v. *The Inhabitants of Pendleton*, *E.* 52 *G.* 3. 449

SETTLEMENT—*by a Tenement of* 10*l. a-year.*

The pauper having agreed to commence tenant of premises of the value of more than 10*l.* a-year from the 5th of *July*, when the former tenant was to quit, by permission of the then tenant put in several of his goods in the shop, of which he received the key, on different days before the 25th of *June*, and afterwards worked in the shop: on that day, finding the key of the house in the outward door, he took it, and put some goods in the house, by permission of the tenant and landlord, and continued to do the same on different days till the 3d of *July*, when he and his family went to sleep there; the proper tenant having left the house on the 25th of *June*: held that this putting of goods in the shop and house, by permission of the outgoing tenant and landlord, and the going to work in the shop, was no occupation of the premises by the pauper, in the relation of tenant of the premises, before the time when his tenancy was agreed to commence; but that he was removable on the 28th of *June*, when he was actually chargeable to the parish. *The King* v. *The Inhabitants of St. Michael, in Coventry*, *E.* 52 *G.* 3. 567

SETTLEMENT—*Witness.*

After a settlement proved at a sessions by the appellants in a third parish, a rated inhabitant of such third parish is not a competent witness for the respondents to disprove that settlement; being directly interested in the judgment of the sessions on that question, inasmuch as the order, if confirmed, would be conclusive evidence of the settlement being at that time in the appellant's parish, upon a subsequent order of removal from thence to such third parish. *The King* v. *The Inhabitants of Terrington*, *E.* 52 *G.* 3. 471

SHERIFF,

See EXECUTION, 1.

The sheriffs of *London*, to whom, as such, a writ of special capias was directed, under which they arrested the plaintiff, cannot be sued for damages for not having taken bail for his appearance, according to the stat. 23 *H.* 6. c. 9; *the sufficiency* of the bail tendered being only alleged to be *within* Middlesex *and* London *taken together*; though it was also averred that from time immemorial the same persons had always been duly appointed to, and had exercised the office of sheriff of the two counties at the same time, and that the defendants were sheriffs of both at the time of the grievance complained of. The stat. 23 *H.* 6. *c.*9. being a public act, need not be specially pleaded. *Lovell* v. *Sir William Plomer, Knt. and S. Goodbehere, Sheriffs of the City of London*, *E.* 52 *G.* 3. 320

SHIP'S-PAPERS,

See INSURANCE, 17.

SOLICITOR,

See ACTION ON THE CASE, 3.

SOUTHWARK COURT.

If a defendant lodge within the jurisdiction of the *Southwark* Court of

Conscience act, 22 *G.* 3. *c.* 47., having conuzance of causes to the amount of *5l.*, by stat. 46 *G.* 3. *c.* 78., though he carry on his business, and the goods were delivered out of the jurisdiction, and the plaintiff had no knowledge of his lodging within it till after the process was sued out; yet he is within the statutes. *Spencer* v. *Holloway*, *E.* 52 *G.* 3. 647

STAMP,

See ANNUITY, 1 & 2. LEASE, 1.

1. A bill drawn on the 1st of *August*, at two months, by *A.* on *B.*, payable to the order of the drawer, and accepted and re-delivered by *B.* as a security for a debt, and kept by *A.* for 20 days, cannot be altered in its legal effect by bringing forward the date to the 21st, without a new stamp; though by the consent of the acceptor, and before indorsement and delivery to a third person; the alteration not being made to correct a mistake in the original form of the bill, which was drawn conformably to the original intention of the parties, and available in that form. *Bathe and Another* v. *Taylor*, *E.* 52 *G.* 3. 412
2. Where a pauper had served a master under unstamped articles of agreement, to work with him for three years, at certain rates of weekly wages, and under certain covenants: after which he had continued to serve his master for four years longer, without coming to any new agreement; though such unstamped writing cannot be received as evidence for the purpose of proving the agreement between the parties, yet the sessions may look at it for the purpose of seeing when it ceased to operate, in order to guide them in receiving parol evidence of service for the last four years, at wages: from whence the sessions might presume a yearly contract. *The King* v. *The Inhabitants of Pendleton*, *E.* 52 *G.* 3. 449
3. By the statutes 35 *G.* 3. *c.* 63. *s.* 14., and 48 *G.* 3. *c.* 149., if several distinct interests be insured in the same policy, though as for one entire sum, on goods, "to be thereafter declared and valued;" and it appear in fact that the several interests included fractional parts of 100*l.*, which interests were afterwards declared and indorsed on the policy; such policy cannot be given in evidence nor is available in law to any extent, unless stamped with a stamp of sufficient value to cover all such fractional parts, though it were sufficient to cover the entire sum insured. *Rapp* v. *Allnutt*, *E.* 52 *G.* 3. 601

STATUTES.

An act passed in the 14 *G.* 2. enabling *T. S. lord of the manor of F.*, his heirs and assigns, at their costs, to convey water in pipes from his estate there to *Portsmouth*, and through the streets, and for that purpose to break up the pavement, making good the same again, is not repealed by the act of the 32 *G.* 3., passed above 50 years afterwards, vesting the property and control of the pavement in commissioners, without exception of the former right; the two acts not being inconsistent, but giving the several powers to be exercised for different purposes: and the water-works, &c. together with the powers under the first act, may be afterwards executed by the assigns of *Smith*, to whom the same, apart from the manor, were conveyed by mesne assignments; though such powers had lain dormant since seven years after the passing of the act, till the 49 *G.* 3. But if *Smith*'s assigns break up the pavement for the purpose of executing the powers re-

served to them, without restoring it again, they are amenable either by indictment or by action, for injury done to the property of the commissioners. *Goldson* v. *Buck*, *E.* 52 *G.* 3. 372

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See TITHES.

TITHES.

In debt upon the stat. 2 & 3 *Ed.* 6. *c.* 13. for not setting out a tenth, as the tithe of hay, the plaintiff is entitled to recover upon his common law right, unless there be evidence of some certain good modus or customary payment in lieu of the common law tithe. And though the plaintiff gave in evidence a terrier of 1696, stating a custom to take the eleventh cock of hay in a certain advanced state of preparation, and though his own and the defendant's witnesses stated other varying modes of payment; yet the terrier not being conclusive, and the jury not finding the 11th or any other specific customary mode of tithing, the plaintiff is entitled to recover. *Blundell, Clerk, and Atherton* v. *Maudsley, E.* 52 *G.* 3. 641

TITLE,

See LEASE, 2.

TRADE AND TRADING LICENCE.

1. Though it should be doubtful whether the stat. 48 *G.* 3. *c.* 37. empowering his majesty, by order in council, to permit during the war, &c. the importation of such goods as shall be *specified* therein from any place from which the *British* flag is excluded in any foreign vessel, authorizes an order in council, licensing a *British* merchant, *in general terms,* to import a cargo "*of such goods as are permitted by law to be imported (except* German *linens, stockfish, and oil;)*" yet an importation into *Great Britain* from a port of *Russia,* under such a licence, of such lawful goods in a neutral *Hamburgh* ship, was held to be authorized by the stat. 49 *G.* 3. *c.* 60., which makes it lawful under any order of council already issued or to be issued, to import from any part of *Europe* or *Africa,* in any *British* or other ship of an alien friend, in any manner navigated, *any goods which may be lawfully imported,* the growth or produce of any country, on payment of duties, &c.; and therefore an insurance on such goods for the voyage is legal. *Schroder* v. *Vaux, H.* 52 *G.* 3. 52
2. And such insurance is valid notwithstanding the licence was limited to be in force until the 29th of *September,* and the ship did not sail from the foreign port till the 4th of *October;* it appearing that the goods were loaded on board by the 12th of *September,* and the adventure was then bonâ fide prosecuting under the licence, and the policy attaching at and from her loading port. *ib.*
3. The king having, by orders in council, declared certain ports in *St. Domingo not hostile,* which had formerly been, but were no longer in the possession nor under the dominion of *France;* though such declarations were made for collateral and limited purposes, not covering in terms the trading in question, yet a trading to such ports from parts of the king's dominions, not named in such prior limited orders, was held to be legalized, the same as to neutral ports in general, by such authoritative recognition of those ports in *St. Domingo* not being hostile. And the inference as to the legality of such neutral trade is not rebutted by a subsequent order of council opening the trade generally (so as to cover in its terms the particular adventure) to all ports of *St. Domingo* not in the possession of *France.* And such trade to neutral ports, requiring no licence from the crown, is not restricted by the fact of a *British* ship carrying a licence for trading to those ports from *Great Britain* with a certain specified car-

go; but the *British* trader may notwithstanding carry other lawful goods, and insure his whole adventure, and may recover from the underwriter a loss arising from capture by a *British* cruizer, though induced by the fact of such trading with goods not covered by the licence which was produced to the captor: for the licence itself not being necessary, the carrying of goods not included in it was no legal cause of seizure, however it might operate upon the question of costs in the prize court. *Blackburne* v. *Thompson*, *H.* 52 *G.* 3. 81

4. Quære whether a person not having served as apprentice to the trade of a miller, who embarked his capital in a mill, which he superintends, and derives the profits of it, through the agency of a foreman statutably qualified, to whom he gave directions as to the order in which the corn of the several customers should be ground; but no otherwise interfered in the management, and never engaged in the manual exercise of the trade; be liable to the penalty given by the stat. 5 *Eliz.* *c.* 4. *s.* 31. *Keen* v. *Dormay*, *H.* 52 *G.* 3. 161
5. Exercising a trade for seven years without molestation exempts from the penalty of the act. *Wallen* v. *Houlton*, in 1759, before all the judges. *ib.* 165
6. A trading licence from the crown to *British* merchants, to send a ship in ballast to an enemy's port, there to receive and load a cargo, and import it into this country, by legalizing the purchase by the subject, legalizes the sale by the enemy, and impliedly legalizes the vendor-enemy's right to stop the goods in transitu after their arrival in port here, upon the intermediate insolvency of the vendees, after a part-payment only, (which was offered to be refunded,) and also to employ an agent here for that purpose: and such agent having possessed himself of the goods, the assignees of the bankrupt vendees cannot recover from him the value of them in trover. *Fenton and Another*, *Assignees of Rennards*, *Bankrupts*, v. *Pearson*, *E.* 52 *G.* 3. 419
7. A licence granted by the secretary of state, under an order in council, by virtue of the stat. 48 *Geo.* 3. *c.* 126. *s.* 2. to *P.*, *B.* and *C.* (who were in fact *British* merchants residing here, but were not so expressed to be in the licence,) on behalf of *themselves* AND OTHERS, to export goods on board a certain vessel, bearing any flag except the *French*, from *London* to *any* port in the *Baltic*, (of which most were at that time hostile, but some were neutral,) will not warrant an export of goods which were the property at the time of the shipment of an alien enemy, a *Russian* subject residing at *Petersburgh*, then a hostile port of the *Baltic*, to which place the cargo was consigned, and at whose desire the licence was obtained by *P.*, *B.* and *C.*: and therefore a policy effected on such goods by such ship from *London* to *Petersburgh*, in the names of *British* agents here, who averred the interest to be in the *Russian* alien enemy, was held bad; and that such policy was also unavailable to cover a loss occasioned by the seizure and condemnation of the assured's own government, after the arrival of the ship and cargo at *Petersburgh*. *Mennett* v. *Bonham*, *E.* 52 *G.* 3. 477
8. An admiralty licence, obtained under the convoy act 43 *G.* 3. *c.* 57. for a ship to sail without convoy, describing her as bound on a voyage to *Gibraltar*, when in fact she sailed from hence with instructions to make the best of her way direct to *Palermo* without touching at *Gibraltar*, unless ordered into the bay by any cruizers which she might meet in passing it, is fraudulent and void, and will not legalize an insurance,

by the charterer of such ship sailing without convoy, upon goods put on board, and insured from hence to *Palermo*, &c., with liberty to proceed to any ports to seek convoy, &c., and therefore will not cover a loss which happened in the latter part of the voyage, though the ship did in fact go into *Gibraltar*, being compelled to it by stress of weather against the master's intentions, and though no convoy was to be procured there, nor licence to proceed without it. *Ingham* v. *Agnew*, *E.* 52 *G.* 3. 517

9. From a licence to *A.* and *B.* (who were in fact *British* merchants residing here) to export goods in a certain ship to any port in the *Baltic*, not blockaded, and to whomsoever the property might appear to belong, the majority of the Court did not sufficiently collect the intention of the crown to cover the property of enemies shipped from hence to an enemy's ports; some ports in the *Baltic* being neutral at the time, though most of them were hostile. *Flindt* v. *Crokatt*, *E.* 52 *G.* 3. 522

10. Whether or not a licence under the stat. 48 *G.* 3. *c.* 126., to *C. F.* and Co., of *London*, merchants, on behalf of themselves and others, to export on board a certain vessel, bearing any flag except the *French*, a cargo of *British* manufactures and colonial produce from *London* to *Archangel*, and to import from thence a cargo on board the said ship of such goods as may lawfully be imported, would warrant an exportation of the goods licensed by a *Russian* purchaser here, *Russia* being then hostile; at all events if such *Russian* owner and alien enemy insure the goods on the voyage from *London* to *Archangel*, and they be seized and condemned by his own government upon their arrival, he cannot recover, by the opinion of a majority of the Court. *Flindt* v. *Scott*, *E.* 52 *G.* 3. 525

TRANSFERABLE STOCK,

See NUISANCE, 1.

TRANSITU,

See TRADE, &c., 6.

TRESPASS,

See OXFORD UNIVERSITY.

1. In trespass quare clausum fregit if the defendant plead the general issue, and also a special justification, that the locus in quo was part of a certain common field, which was then allotted to him by the leet jury of the manor; and the plaintiff reply and new assign to the special plea, after setting out the abuttals of the closes trespassed upon, that the closes newly assigned are different from the defendant's allotment; if in fact they be the same, the defendant is entitled to a verdict on the issue upon the new assignment. *Pratt* v. *Groome*, *H.* 52 *G.* 3. 235

2. To a plea of justification in trespass, under a plea of capias ad satisfaciendum issued at the suit of the now defendant against the now plaintiff, by virtue of which the latter was arrested and detained till payment of 1267*l.*, if the plaintiff reply that the writ was irregularly issued for so much, whereas it ought only to have been for 300*l.*, and that the Court afterwards, on motion, ordered it to be *quashed;* which fact was found for the plaintiff; the Court will intend on the plaintiff's own shewing that the writ was only *quashed for the excess*, and will therefore arrest the judgment. *King* v. *Harrison, one, &c.* *E.* 52 *G.* 3. 612

TROVER,

See AWARD, 2.

TRADING LICENCE, 6.

1. Under a submission to an arbitra-

tor of all matters in difference between landlord and tenant, the arbitrator awarded, inter alia, that a stack of hay left upon the premises by the tenant, should be delivered up by him to the landlord by a certain day, upon the tenant being paid or allowed a certain sum in satisfaction for it: Held that the property in the hay did not pass to the landlord on his tender of the money, by the mere force of the award, against the consent of the tenant, who refused to accept the money or deliver up the hay; and therefore that the landlord could not maintain trover for it; but his remedy was upon the award. *Hunter* v. *Rice*, *H.* 52 *G.* 3. 100

1. A tradesman supplying a married woman living apart from her husband with furniture upon hire, does not thereby divest himself of the present right of property in such goods, inasmuch as the married woman was incapable of acquiring it by any contract; and therefore if the sheriff take such goods in execution at the suit of the husband's creditor, trover lies by the tradesman. But if the contract had been valid, the goods being let to hire generally, without any time limited, notice to determine the contract given to the sheriff's officer, and not to the other contracting party, would not be sufficient to determine the contract. *Smith* v. *Plomer*, *Knight*, *and Another*, *Sheriffs of Middlesex*, *E.* 52 *G.* 3. 607

TRUST ESTATE,

See SETTLEMENT—*by Estate*, 1.

UNIVERSITY,

See OXFORD UNIVERSITY.

VENDOR AND VENDEE.

1. The stat. 21 *Jac.* 1. *c.* 19. *s.* 11. only transfers to the assignees of a bankrupt such goods as, by the consent of the true owner, the bankrupt has in his possession, *at the time of the bankruptcy*. Therefore where the purchaser of goods, lying at a wharf in the name of the seller, received from him at the time of the sale an order on the wharfinger for the delivery of the goods, but suffered them to remain in the name of the seller for several months after; during which time the seller disposed of a part thereof; but upon notice of the seller's insolvency the purchaser carried the order to the wharfinger, and had the goods transferred into his own name; and nine days after that the seller became bankrupt: Held that the assignees of the bankrupt were not entitled to these goods; for there was a complete transfer of the possession before the bankruptcy. *Jones and Another*, *Assignees of Mingay and Co.*, *Bankrupts*, v. *Dwyer and Another*, *H.* 52 *G.* 3. 21

Qu. Whether the statute would at any rate have extended to goods the joint property of two traders, but deposited at the wharf in the name of one only, who, after such sale in his own name, became bankrupt? *ibid.*

Qu. Also, whether a broker, who sells goods and receives the money for them on account of his principal, can controvert his title to the goods in an action brought against him by the principal for the money? *ib.*

2. A material alteration in a sale-note by the broker, after the bargain made, at the instance of the seller, without the consent of the purchaser, annuls the instrument, so as to preclude the seller from recovering upon the contract: evidenced by the instrument so altered by him. *Powell and Others* v. *Divett and Others*, *H.* 52 *G.* 3. 29

3. Where a purchaser of hemp lying at wharfs in *London*, had at the time of his purchase, the hemp transferred

in the wharfinger's books into the name of the broker who effected the purchase for him, and whose ordinary business it was to buy and sell hemp; this was held to give the broker an implied authority to sell it, and that his sale and receipt of the money bound his unknown principal. So if it be transferred into the names of "*P.* or *S.*," that is, of the principal or broker. *Pickering* v. *Bush and Another, Assignees of Hayward and Another, Bankrupts*, *H.* 52 *G.* 3. 38

4. If the seller of goods, knowing at the time that the buyer, though dealing with him in his own name, is in truth the agent of another, elect to give the credit to such agent, he cannot afterwards recover the value against the known principal; but if the principal be not known at the time of the purchase made by the agent, it seems that when discovered, the principal or the agent may be sued, at the election of the seller; unless where, by the usage of trade, the credit is understood to be confined to the agent so dealing; as particularly in the case of principals residing abroad. *Paterson and Another* v. *Gandasequi*, *H.* 52 *G.* 3. 62

5. A memorandum in writing of a contract for the purchase of flour by the defendant of the plaintiff, a miller, taken by the plaintiff's rider, in his common order book, in these terms; "19th *Feb.* 1811—of *John Smith* 64*l.*" (which was explained by the witness to mean so much received of the defendant in satisfaction of a former order,) "*Do.* 40 *of* 3—58*l.*;" (which was explained to mean an order for 40 sacks of flour called *thirds*, at 58*s.* a sack,) and this without any signature is not a sufficient memorandum in writing of the bargain within the statute of frauds, 29 *Car.* 2. *c.* 3. *s.* 17. to bind the defendant; though it was read over to him by his desire at the time it was written. And such defective memorandum cannot be supplied by a letter written afterwards by the defendant, in which, though he recognised the order, yet he insisted that the flour had not been delivered in time, and therefore he was not bound to take it: and it was not competent for the plaintiff to prove, by the parol testimony of the person who took the order, that there was no such term in the contract as to deliver the flour within a given time. *Cooper* v. *Smith*, *H.* 52 *G.* 3. 103

6. A trading licence from the crown to *British* merchants to send a ship in ballast to an enemy's port, there to receive and load a cargo and import it into this country, by legalizing the purchase by the subject legalizes the sale by the enemy, and impliedly legalizes the vendor enemy's right to stop the goods in transitu after their arrival in port here, upon the intermediate insolvency of the vendees after a part-payment only, (which was offered to be refunded) and to employ an agent here for that purpose, and such agent having possessed himself of the goods, the assignees of the bankrupt vendees cannot recover from them the value of the goods in trover. *Fenton and Another, Assignees of R. and T. Rennards, Bankrupts*, v. *Pearson and Another*, *E.* 52 *G.* 3. 419

VOIR DIRE.

See WITNESS, 1.

WARRANT OF ATTORNEY.

A *joint* warrant of attorney, given to enter judgment upon a *joint* and *several* bond, will not authorize the entering up judgment against the survivor only. *Gee* v. *Lane*, *E.* 52 *G.* 3. 592

WITNESS.

1. Upon appeal against an order of removal, the appellant township having produced one of its inhabitants as a witness, who being examined upon the voir dire stated that he was the occupier of a cottage there of the annual value of 25 shillings, but that he was not rated to nor paid any public rate or tax; such answer must be taken to be true for the purpose; and it cannot be objected to his examination in chief, that the best evidence of the fact was not given, by the production of the rate itself. *The King* v. *The Inhabitants of the Township of Gisburn, H.* 52 *G.* 3. 57

2. After a settlement proved at the sessions by the appellants in a third parish, a rated inhabitant of such third parish is not a competent witness for the respondents to disprove that settlement, being directly interested in the judgment of the sessions on that question, inasmuch as the order if confirmed would be conclusive evidence of the settlement being at that time in the appellant's parish, upon a subsequent order of removal from thence to such third parish. *The King* v. *The Inhabitants of Terrington, E.* 52 *G.* 3. 471

END OF THE FIFTEENTH VOLUME.

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